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TINKERING WITH THE MACHINERY OF DEATH:¹ AN EXAMINATION AND ANALYSIS OF STATE INDIGENT DEFENSE SYSTEMS AND THEIR APPLICATION TO DEATH-ELIGIBLE DEFENDANTS

In the midst of the firestorm of disagreement and debate focused on the wisdom and effectiveness of the death penalty, critics and supporters of the death penalty agree on one thing: the system for providing representation to indigent death-eligible defendants is badly flawed and does not function properly.² During recent years, those who work within the death penalty system and those who preside over it have voiced systemic criticisms of the death penalty.³ Justice Blackmun's recent dissent in *McFarland v. Scott*⁴ demonstrates that these systemic criticisms have become as forceful as arguments about the philosophical and moral underpinnings of the death penalty itself. In his dissenting opinion, Justice Blackmun noted his belief that the judiciary is not meeting its constitutional requirement of providing competent counsel to death-eligible defendants and that the death penalty cannot be fairly imposed under the present system.⁵

1. *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.").

2. See Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals To Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1673 (1990).

3. See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (arguing that the quality of legal representation is often the deciding factor in whether a defendant receives the death penalty); Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1 (1986) (discussing the belief that defendants in capital cases are not given an adequate opportunity to defend themselves).

4. 114 S. Ct. 2785, 2785 (1994) (Blackmun, J., dissenting).

5. *Id.* (Blackmun, J., dissenting). Justice Blackmun stated:

When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing. My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt whether this reliance is justified and

During the past several years, Congress has focused its attention on reforming the habeas corpus process to eliminate lengthy delays.⁶ The result is the recent passage by the House of Representatives of the Effective Death Penalty Act of 1995, which purports to reform the habeas corpus review process.⁷ Although the problems that exist in the habeas corpus process are widely acknowledged, these problems are often caused by the inadequate representation of indigent defendants at the trial level.⁸ This Note urges reformers to focus their efforts on providing better representation at the trial stage instead of limiting postconviction review.

Although no one state indigent defense system can absolutely guarantee that a defendant will receive the effective assistance of counsel mandated by the Sixth Amendment, this Note argues that existing state indigent defense systems are flawed and that states should reform these systems by establishing capital trial units to provide specialized legal representation to all indigent capital defendants. The first section of this Note outlines the scope of the Sixth Amendment right to counsel. The second section examines Congress's recent death penalty reforms and discusses why they will not improve the system. The third section then examines the different types of systems that states have established to provide defense services to indigent capital defendants and details the problems that those systems have experienced. The fourth section explains how the implementation of alternative systems, such as capital trial units and qualification standards for capital counsel, can improve the performance of

whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled. It is my hope and belief that this Nation soon will come to realize that capital punishment cannot morally or constitutionally be imposed. Until that time, however, we must have the courage to recognize the failings of our present system of capital representation and the conviction to do what is necessary to improve it.

Id. at 2790 (Blackmun, J., dissenting).

6. See Berger, *supra* note 2, at 1665-69 (describing the problem of delayed executions and the recommendations made to reduce delays).

7. H.R. 729, 104th Cong., 1st Sess. (1995).

8. TASK FORCE ON DEATH PENALTY HABEAS CORPUS, AMERICAN BAR ASS'N, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES, *reprinted in* 40 AM. U. L. REV. 1, 15-16 (1990) [hereinafter TASK FORCE REPORT].

state indigent defense systems with respect to their defense of capital defendants. Finally, the fifth section examines the possibility of federal legislation mandating the use of capital trial units or, in the alternative, imposition of such a system by the judiciary

THE RIGHT TO COUNSEL

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence."⁹ In 1932, the Supreme Court held in *Powell v. Alabama*¹⁰ that this right included the right of indigent defendants who are incapable of defending themselves to have counsel appointed without cost in capital cases.¹¹ Not until 1963, in *Gideon v. Wainwright*,¹² did the Court decide to extend the right to counsel without cost to all indigent defendants charged with a felony.¹³ In that same year, the Court held that the states must provide counsel to indigent defendants on their first appeal of right.¹⁴ The right to counsel continued to expand in 1972, when the Court declared in *Argersinger v. Hamlin*¹⁵ that an indigent's right to appointed counsel extends to defendants charged with a misdemeanor who are in danger of losing their liberty.¹⁶

Although the Supreme Court has held that the Sixth Amendment right to counsel requires the appointment of counsel at the trial level,¹⁷ it has not found that the states are constitutionally required to provide indigent defendants with counsel during postconviction proceedings.¹⁸ Congress, however, has enacted a statute that provides for the appointment of counsel to represent an indigent capital defendant in federal postconviction proceed-

9. U.S. CONST. amend. VI.

10. 287 U.S. 45 (1932).

11. *Id.* at 71-73.

12. 372 U.S. 335 (1963).

13. *Id.* at 344-45.

14. *Douglas v. California*, 372 U.S. 353, 357-58 (1963).

15. 407 U.S. 25 (1972).

16. *Id.* at 37.

17. *Id.*, *Gideon*, 372 U.S. at 344-45.

18. *Murray v. Giarratano*, 492 U.S. 1, 4 (1989).

ings.¹⁹ Recently, the Court held, in *McFarland v. Scott*,²⁰ that a federal district court has the power to appoint an attorney to represent an indigent capital petitioner even though the capital petitioner has not yet filed a petition in federal court.²¹

In addition to explaining when states must provide representation to indigent defendants, the Court also has commented extensively on the quality of the representation that must be provided. The Court has held that the Sixth Amendment right to counsel is the right to effective assistance of counsel.²² In *Strickland v. Washington*,²³ the Court established a two-part test to determine if an indigent defendant's representation was ineffective.²⁴

For a defendant to prove that he received ineffective assistance of counsel at his trial, he must show that counsel's representation was objectively unreasonable²⁵ and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²⁶ This test is extremely difficult to satisfy²⁷ because when a court considers such a claim, it presumes that the challenged representation was competent and uses an extremely deferential standard of review.²⁸ As a result, courts rarely grant ineffective assistance claims, despite the horrific stories about incompetent and ineffective representation in many cases.²⁹ The definition

19. Capital defendants are entitled to appointed counsel in federal habeas corpus proceedings initiated under 28 U.S.C. § 2254 or 28 U.S.C. § 2255. 21 U.S.C. § 848(q)(4)(B) (1994).

20. *McFarland v. Scott*, 114 S. Ct. 2568 (1994).

21. *Id.* at 2572.

22. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

23. 466 U.S. 668 (1984).

24. *Id.* at 687.

25. *Id.* at 688.

26. *Id.* at 694.

27. "Ten years after the articulation of [the *Strickland*] standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'" *McFarland v. Scott*, 114 S. Ct. 2785, 2787 (1994) (Blackmun, J., dissenting) (quoting *Strickland*, 466 U.S. at 685); see also Bright, *supra* note 3, at 1862-66 (commenting on the inadequacy of the *Strickland* standard in death penalty cases).

28. *Strickland*, 466 U.S. at 689-90.

29. For a detailed catalog of horror stories about incompetent counsel, see Bright,

of the right to counsel has seen steady expansion since the Supreme Court first recognized it in *Powell*.³⁰ The right has yet to be extended to the postconviction level, however, and, due to the high standard that *Strickland* imposes on those defendants seeking to show that their representation at trial was incompetent and ineffective, the system assumes adequate representation at the trial level.³¹ This assumption is misplaced. In many cases, indigent defendants do not receive adequate representation at the trial level, yet their claims do not satisfy the *Strickland* standard of ineffectiveness.³² This problem is especially serious in capital cases because, without adequate representation at the trial level, a capital defendant may lose or waive many of his claims.³³

Many commentators have argued that the Supreme Court

supra note 3; see also Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923 (1994) (arguing that the Eighth Amendment requires a higher standard for competency of counsel in capital cases because of their complexity).

30. See *supra* notes 9-20 and accompanying text.

31. See generally Note, *supra* note 29, at 1933-35 (advocating the rejection of *Strickland's* standard in capital cases).

32. See, e.g., *Messer v. Kemp*, 474 U.S. 1088, 1089-91 (1986) (Marshall, J., dissenting) (observing that the defense counsel's failure to make an opening statement during the guilt phase, failure to present defense evidence, failure to present mitigating evidence, and his repeated hints that his client should receive the death penalty did not amount to ineffective assistance); *Graham v. Collins*, 829 F. Supp. 204, 209 (S.D. Tex. 1993) (holding that the defense counsel's failure to introduce ballistics tests showing that the defendant's gun was not the murder weapon was not ineffective assistance); *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App.) (en banc) (finding the defense counsel's admission to the jury that his client was guilty was not ineffective assistance of counsel because it was held to be a trial tactic), *cert. denied*, 113 S. Ct. 3062 (1993); *Black v. State*, 816 S.W.2d 350, 357-58 (Tex. Crim. App. 1991) (en banc) (holding that the defense counsel's failure to object to the prosecutor's incorrect statement of the requirements for issuing a death sentence did not prejudice the defendant), *cert. denied*, 504 U.S. 992 (1992).

33. *McFarland v. Scott*, 114 S. Ct. 2785, 2787 (1994) (Blackmun, J., dissenting).

The consequences of such poor trial representation for the capital defendant, of course, can be lethal. Evidence not presented at trial cannot later be discovered and introduced; arguments and objections not advanced are forever waived. Nor is a capital defendant likely to be able to demonstrate that his legal counsel was ineffective, given the low standard for acceptable attorney conduct and the high showing of prejudice required under *Strickland v. Washington*

Id. (Blackmun, J., dissenting) (footnote omitted).

needs to reexamine the *Strickland* standard and reevaluate the requirements of the Sixth Amendment³⁴ or, in the alternative, to create a higher standard for assistance of counsel in capital cases.³⁵ Until this is done, however, capital defendants will continue to face the presumption that they were defended at trial by competent counsel.³⁶ Reformers must focus on making that presumption a reality

THE HABEAS CORPUS REFORM MOVEMENT

Both proponents and opponents of the death penalty acknowledge that the system of administering the death penalty is flawed and needs repair.³⁷ Both sides disagree, however, about the nature of the problem and the best way to repair it.³⁸ Death penalty opponents have based their arguments either on moral opposition,³⁹ on the system's failure to provide adequate representation to defendants at the trial level,⁴⁰ or on the rigidity and strictness of the habeas review system.⁴¹ In contrast, death penalty proponents have argued that, for the death penalty to be effective as a deterrent, it must be delivered as quickly as possible after conviction.⁴² Proponents argue that the federal and state habeas corpus processes take too long and allow for too much delay before an execution is carried out.⁴³ These argu-

34. See Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 433 (1993) (arguing for a redefinition of "counsel" under the Sixth Amendment to include only counsel qualified to present an adequate defense).

35. Note, *supra* note 29, at 1923.

36. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

37. Berger, *supra* note 2, at 1673.

38. See generally TASK FORCE REPORT, *supra* note 8, at 59-60 (describing the different perceptions among death penalty critics and proponents about the benefits and evils of delay in the review process).

39. See, e.g., *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting).

40. See, e.g., Bright, *supra* note 3, at 1835-37.

41. See Berger, *supra* note 2, at 1666.

42. See *id.* at 1668-69.

43. One of the strongest critics of the habeas process is Chief Justice Rehnquist. He has argued consistently that the process should be reformed to ensure that death sentences are carried out promptly and not bogged down for years while federal courts review state-imposed sentences. See *Coleman v. Balkcom*, 451 U.S. 949, 959-

ments, however, are based on the premise that the additional review of death sentences provided during habeas corpus is unnecessary because the inmate received adequate representation at the trial level and was tried and convicted fairly. To understand why reformers should focus on the system at the trial level, this Note will examine recent habeas corpus reform proposals and explain why they will exacerbate the systemic problems instead of solving them.

*Recent Habeas Reform Efforts—The Effective Death Penalty Act of 1995*⁴⁴

The habeas corpus process has engendered controversy since its inception,⁴⁵ and Congress has regularly considered reform bills since 1953.⁴⁶ Although none of the past reform bills have passed, habeas corpus reform has become an important national issue, and Republicans who signed the "Contract with America" identified it as a priority.⁴⁷ The most recent habeas corpus reform bill, The Effective Death Penalty Act of 1995, passed in the House of Representatives on February 8, 1995, and the Senate is currently considering similar legislation.⁴⁸

The Effective Death Penalty Act, like many of its predecessors, focuses on eliminating the delays caused by the habeas review process.⁴⁹ Regardless of whether the Senate approves the House-passed habeas reform bill, it represents a continuation of previous reform attempts. Indeed, it seems likely that federal legislators will continue to propose such legislation until they finally approve some habeas reform measure.

60 (1981) (Rehnquist, J., dissenting).

44. H.R. 729, *supra* note 7.

45. TASK FORCE REPORT, *supra* note 8, at 53-54.

46. Berger, *supra* note 2, at 1667.

47. Naftali Bendavid, *Getting Even Tougher on Crime*, CONN. L. TRIB., Nov. 21, 1994, at 8.

48. H.R. 729, *supra* note 7; 141 CONG. REC. H1400-34 (daily ed. Feb. 8, 1995); see also Habeas Corpus Reform Act of 1995, S. 623, 104th Cong., 1st Sess. (containing the Senate's version of the Effective Death Penalty Act, which is being considered by the Judiciary Committee).

49. For a detailed examination of previous habeas corpus bills, see Berger, *supra* note 2, at 1704-14.

The Effective Death Penalty Act consists of two sections.⁵⁰ Title I is entitled "Habeas Corpus Reform"; it details reforms that will affect all prisoners filing for habeas corpus relief.⁵¹ Title II deals specifically with reforming death penalty procedures.⁵² Under Title I, state prisoners must file any federal petition challenging their conviction within one year from the date of the denial of habeas relief by the state court of last resort.⁵³ In addition, the bill would require that federal prisoners seeking to challenge their conviction file a federal petition within two years after their direct appeal has ended.⁵⁴

The bill also requires that prisoners who have had their petitions denied by a federal district court receive a certificate of probable cause from either a circuit court or a Justice of the Supreme Court before an appeal can be granted.⁵⁵ Finally, under Title I, a federal district court has the authority to deny relief on the merits even though the petitioner has not yet exhausted his claim in the state courts.⁵⁶

Title II focuses exclusively on reforming postconviction review procedures in death penalty cases.⁵⁷ To be eligible for the application of these special provisions, a state must establish:

by rule of its court of last resort or by statute a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners. The rule of court or statute must provide standards of competency for the appointment of such counsel.⁵⁸

50. H.R. 729, *supra* note 7.

51. *Id.*

52. *Id.*

53. *Id.*, see *Habeas Corpus Reform: Hearings on H.R. 729 Before the Subcomm. on Crime and Criminal Justice of the House Judiciary Comm.*, 104th Cong., 1st Sess. (1995) [hereinafter *1995 Habeas Corpus Reform Hearings on H.R. 729*] (statement of Larry Yackle, Professor of Law, Boston University School of Law).

54. *1995 Habeas Corpus Reform Hearings on H.R. 729, supra* note 53 (statement of Larry Yackle).

55. Under present law, such certificates are also necessary for an appeal, but district court judges may issue them. *Id.*

56. *Id.*

57. Title II, "Federal Death Penalty Procedures Reform," is the heart of the Effective Death Penalty Act. H.R. 729, *supra* note 7, tit. II.

58. H.R. 729, *supra* note 7, § 2256. This provision only encourages the state to

If a state has established such a mechanism, it qualifies for the application of several special provisions. First, the legislation would allow federal district courts to grant a stay of execution when considering a prisoner's initial petition.⁵⁹ To receive a stay for a successive petition, however, a petitioner would have to demonstrate by clear and convincing evidence that, but for a constitutional error, no reasonable jury would have convicted him or sentenced him to death.⁶⁰ Furthermore, only the same judge who denied the defendant's original petition could analyze any successive petitions, and he could consider them only if he determined that the filings were not abuses of the writ.⁶¹ The bill also requires a prisoner to file any federal habeas corpus petition within 180 days of the appointment of counsel to pursue state postconviction proceedings.⁶² While the prisoner has

provide competent counsel during postconviction proceedings. The House rejected an amendment that sought to encourage states to provide competent effective counsel during the initial trial by a vote of 282 to 149. 141 CONG. REC., *supra* note 48, at H1406-07. The amendment, offered by Representative Schumer, would have required states to set up an organization to establish standards for the appointment of competent counsel in capital cases and to ensure that attorneys in death cases were appointed from the roster established by the organization. *Id.* If states did not implement this system, they would have been ineligible for the habeas restrictions in the bill. *Id.*

In response to the amendment, the proponent of the Effective Death Penalty Act, Representative McCullom, stated:

[T]he truth of the matter is that we do have a procedure for adequate counsel and all kinds of protections for the accused that are built into that system at the trial level.

[W]hat he does by his amendment today is to add a series of things that people have to go through, a roster has to be formed, a State has to pass a counsel authority in one of three or four forms and you have to comply with all of these procedures and in the end the expense and the problems and the difficulty of going through this in my judgment and many others' who have looked at this will mean that most States will choose not to do this. Therefore, we will not have an effective bill. We will not shorten the time death row inmates have for carrying out their sentences that we want to do.

Id. at 1407. This statement demonstrates that the proponent of the bill focused on efficiency of executions and did not want states to have to undergo the trouble of ensuring that qualified counsel represent indigent capital defendants.

59. See H.R. 729, *supra* note 7, § 2257(a).

60. *Id.* § 2257(c)(3).

61. *Id.* § 2257(d).

62. 1995 *Habeas Corpus Reform Hearings on H.R. 729*, *supra* note 53, at 102

state postconviction petitions pending, the 180-day limitation is suspended.⁶³

Finally, Title II limits the time that the federal courts have to consider habeas petitions. Under section 2262, a federal district court must make a decision on a prisoner's petition within sixty days after hearing argument, and a federal appellate court must make a decision within ninety days after receiving the briefs from both sides.⁶⁴

Reform of the Death Penalty System Should Be Focused on Providing Better Representation to Death-Eligible Defendants at Trial and Should Not Focus Exclusively on the Postconviction Phase

The proposals that have emerged from the habeas corpus reform debate so far and the approach that the House of Representatives has adopted in the Effective Death Penalty Act can be summed up generally as the "one-bite-at-the-apple rule."⁶⁵ The reform bill attempts to accord death row inmates one full opportunity for federal and state review of their claims while strictly restricting successive petitions.⁶⁶ These reforms are based on the perception that delay is caused either by the death row inmates themselves or by the court system's failure to deal expeditiously with habeas petitions.⁶⁷ In reality, the massive delay and unfairness that occur during postconviction proceedings result from inadequate representation at the trial level.⁶⁸

(statement of Larry Yackle).

63. *Id.*

64. *Id.*

65. Berger, *supra* note 2, at 1674 (quoting 135 CONG. REC. S13,473 (daily ed. Oct. 16, 1989) (statement of Sen. Biden)).

66. *Id.*

67. *Id.* at 1668-71.

68. See *Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. 432 (1993) [hereinafter 1993 *House Judiciary Habeas Hearings*] (statement of George H. Kendall, Assistant Counsel, NAACP Legal Defense Fund); THE SPANGENBERG GROUP, STUDY OF REPRESENTATION IN CAPITAL CASES IN VIRGINIA 28 (1988) ("If appointed counsel for indigent defendants in capital cases were to be adequately paid and given those resources necessary to provide the best representation possible, then the kinds of problems and errors which come up through post-conviction appeals might be substantially reduced."); see also TASK FORCE REPORT, *supra* note 8 at 15-16 (arguing

The states' failure to provide competent counsel at the trial level in death penalty cases, which are much more complex than most types of litigation, results in a high level of constitutional error caused by undercompensated and ill-prepared counsel.⁶⁹ As a result, the federal courts must painstakingly examine each habeas case to weed out these constitutional errors.⁷⁰ Because inadequate representation causes or at least contributes to the problems of delay during postconviction proceedings, any reform bill must address this problem to make reform proposals effective.⁷¹ Any attempt to reform the habeas system that fails to address the issue of representation at the trial level would be "like trying to stop massive internal bleeding with a butterfly patch."⁷²

Unfortunately, while the Effective Death Penalty Act mandates that states provide some means for ensuring that competent counsel represent indigent death-eligible defendants during postconviction proceedings in order for the states to be eligible

that inadequate representation "greatly aggravates and protracts the death penalty review process"); Bright *supra* note 3, at 1837 ("The process of sorting out who is most deserving of society's ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing.").

69. 1995 *Habeas Corpus Reform Hearings on H.R. 729*, *supra* note 53 (statement of Gerald H. Goldstein, President, National Ass'n of Criminal Lawyers). The high level of error has caused the federal courts to order retrials in almost 40% of the death penalty cases reviewed before 1976. *Id.*

70. The ABA Task Force on the Death Penalty noted in a 1989 report that: Without any doubt, the inadequacy of representation at the trial level greatly increases the risk of convictions that are flawed by fundamental factual, legal, or constitutional error. Too often, due to inadequacies of counsel, the jury never gets to hear evidence that could thoroughly alter its view of a case. Equally often, trial and appellate lawyers typically do not understand the post-conviction implications—state or federal—of their acts or omissions. A great deal of time thus is consumed during state and federal post-conviction review to determine whether these mediocre performances by counsel pass the *Strickland* standard. It is simply unrealistic to expect the system to operate better when its most fundamental component—informed, diligent, and effective advocacy—is missing at the trial level, the "fountainhead of justice."

TASK FORCE REPORT, *supra* note 8, at 69 (footnotes omitted).

71. See 1993 *House Judiciary Habeas Hearings*, *supra* note 68, at 449 (statement of George H. Kendall).

72. 1995 *Habeas Corpus Reform Hearings on H.R. 729*, *supra* note 53 (statement of Gerald H. Goldstein).

for the habeas time limits, the bill does not encourage the states to provide competent counsel at the trial level.⁷³ The failure to address the problem of ensuring adequate representation at the trial level is destined to eviscerate any increase in the effectiveness of representation during postconviction proceedings. The initial trial is "virtually the whole ball game" and once errors are made at that stage, counsel may not be able to cure them during appellate or postconviction review.⁷⁴

In addition to its failure to address representation at the trial level, the bill does not go far enough in its efforts to ensure adequate postconviction review. Although the measure requires states to adopt standards for appointing attorneys to postconviction cases, it leaves to the states the task of developing applicable standards.⁷⁵ Although the effectiveness of appointment standards is debatable, requiring attorneys to meet some set of standards is a step toward improving the quality of representation in capital cases.⁷⁶ It is difficult to believe, however, that states that consistently have underfunded indigent defense programs and have tolerated inadequate representation for indigent defendants for decades will suddenly adopt strict standards to ensure the appointment of qualified counsel.⁷⁷ The failure of the House of Representatives to impose mandatory standards is disappointing, particularly in light of the American Bar Association's (ABA) compilation of model standards.⁷⁸

In light of the bill's failure to require significant reforms of state indigent defense systems, the provisions that provide for speeding up the review process will merely exacerbate the problems that already exist. While states may carry out executions faster, the system will not be able to exercise the careful, search-

73. See H.R. 729, *supra* note 7, § 2256.

74. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 33 (1989) [hereinafter ABA GUIDELINES]; see 1995 *Habeas Corpus Reform Hearings on H.R. 729*, *supra* note 53 (statement of Larry Yackle) ("If counsel is not provided until the post-conviction stage, I am afraid that the real damage to constitutional rights will already have been done and that ever more time and effort will have to be spent to sort things out in federal court.").

75. See H.R. 729, *supra* note 7, § 2256.

76. See *infra* notes 254-68 and accompanying text.

77. See Berger, *supra* note 2, at 1690.

78. See ABA GUIDELINES, *supra* note 74.

ing review of habeas petitions that must accompany any trial system that produces a large number of constitutional errors and violations due to inexperienced and incompetent counsel.⁷⁹ In particular, the bill's requirement that indigent death row inmates file their federal habeas petitions within six months after the state courts deny their petition is too restrictive and does not allow adequate time for the preparation of a federal habeas corpus petition.⁸⁰

The bill's other provisions regarding restrictions on filing successive petitions, authorization to deny relief despite a failure to exhaust state remedies, and filing deadlines for federal prisoners also will exacerbate the problems in the habeas system.⁸¹ As a whole, the bill fails to address the critical issue of providing competent counsel to death-eligible defendants at the trial level and instead leaves to the states the need to adopt their own systems for the appointment and compensation of counsel.⁸²

Congress's failure to evaluate state indigent defense systems specifically and to require them to use specific types of systems to provide indigent capital defendants with counsel is perhaps

79. *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir.) (en banc), *cert. denied*, 493 U.S. 944 (1989), demonstrates why the review process should not be subject to stringent time limitations. Dewey Coleman spent more than thirteen years on death row before his conviction was reversed despite the fact that there were "glaring deficiencies" in the case against him. *Id.* at 1292 (Reinhardt, J., concurring). In a world with time limitations on habeas review, Coleman might have been executed before these deficiencies could have been uncovered and addressed. *Id.* (Reinhardt, J., concurring) (stating that "the case of Dewey Coleman illustrates the fact that curtailing the federal habeas corpus procedures in death penalty cases would seriously undermine our system of justice and our commitment to constitutional values").

80. See 1995 *Habeas Corpus Reform Hearings on H.R. 729*, *supra* note 53 (statement of Larry Yackle) ("[I]n light of the complexity of capital cases and the time required to recruit lawyers to handle them, I should think that the one year period contained in last year's bill is the shortest that can sensibly be established."); see also Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 487-96 (1991) (discussing why a six-month limit does not provide an attorney with the time to properly prepare a habeas petition).

81. For a detailed discussion of the problems that these reforms will cause, see Berger, *supra* note 2, at 1704-14.

82. H.R. 729, *supra* note 7, § 2256; see also 141 CONG. REC., *supra* note 48, at H1406-09 (containing debate about whether states should be compelled to establish a system ensuring adequate representation at the trial level).

due partly to concerns about notions of federalism.⁸³ In any event, reformers should focus on identifying an effective and efficient state indigent defense system that provides competent representation to death-eligible defendants and then concentrate on encouraging or forcing states with the death penalty to adopt such a system. The first step toward this goal is to identify the types of indigent defense systems that states use today and to analyze their strengths and weaknesses in order to design a more effective system.

AN ANALYSIS OF TRIAL REPRESENTATION SYSTEMS

Since the Supreme Court's announcement in *Gideon* that the Sixth Amendment requires states to provide indigent defendants with competent counsel, the states have struggled to establish systems that comply with this mandate.⁸⁴ States have been responsible for designing, implementing, and funding these systems.⁸⁵ Unfortunately, while indigent defendants in all of the states receive representation through some form of state defense system, the representation, particularly in capital cases, often does not comply with the requirements of the Sixth Amend-

83. See *infra* notes 276-321 and accompanying text; see also 1995 House Judiciary Habeas Hearings on H.R. 729, *supra* note 53, at 495 (statements of Benjamin Civiletti, Nicholas de B. Katzenbach, Edward H. Levi, and Elliot L. Richardson on behalf of the Emergency Committee To Save Habeas Corpus).

Consistent with notions of federalism, states must be free to provide a lesser level of counsel [than the one required by a provision requiring appointment of counsel from a roster of qualified attorneys] if they wish, but the federal courts should not then be required to sort through the various procedural doctrines which presume that the state court trial was full and correct and should simply proceed directly to the merits of the habeas claim.

Id. See generally Note, *supra* note 29, at 1938-39 & n.146 (discussing the role that federalism plays in limiting federal actions that would mandate that states take steps to improve the quality of defense provided in capital cases).

84. AMERICAN BAR ASS'N, *GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING* 3 (1983) [hereinafter *GIDEON UNDONE*] (statement of Robert Raven, Chairman, ABA Standing Committee on Legal Aid and Indigent Defendants).

85. See NORMAN LEFSTEIN, *CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING* apps. a-g (1982) (describing state indigent defense systems, listing state statutes establishing the systems, and detailing the source of funds used to support each system).

ment.⁸⁶ In death penalty cases, this noncompliance is especially disturbing due to the permanence of the punishment.⁸⁷

These systems fail to fulfill their function primarily because the states do not provide enough funding for indigent defense.⁸⁸ Because states have little money to compensate private counsel adequately or to establish public defender programs to specialize in capital cases, few attorneys volunteer to represent capital defendants, and public defenders cannot do so adequately.⁸⁹ Several commentators have recognized the funding problem and have discussed it at length.⁹⁰ Ultimately, until indigent defense systems are funded properly, it will be difficult, if not impossible, to ensure that all indigent capital defendants receive the level of representation that the Sixth Amendment requires.⁹¹

Unfortunately, the funding horizon looks bleak. With the recent passage of the 1994 Federal Crime Bill,⁹² most federal funds will go to state and federal law enforcement agencies and not to indigent defense.⁹³ Within the states, prosecutors traditionally have received more than three times the amount that defense services have received and, with the current "tough-on-

86. Bright, *supra* note 3, at 1841 ("Inadequate legal representation does not occur in just a few capital cases. It is pervasive in those jurisdictions which account for most of the death sentences.").

87. See *McFarland v. Scott*, 114 S. Ct. 2785, 2787 (1994) (Blackmun, J., dissenting); Marshall, *supra* note 3, at 1.

88. For a detailed discussion of the states' failure to provide adequate funding to indigent defense systems and the effects of this underfunding, see generally *GIDEON UNDONE*, *supra* note 84 (noting problems with states' indigent defense programs); SECTION OF CRIMINAL JUSTICE, AMERICAN BAR ASS'N, *THE INDIGENT DEFENSE CRISIS* (1993) [hereinafter *THE INDIGENT DEFENSE CRISIS*] (summarizing the fundamental problems in indigent defense nationwide); Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis Is Chronic*, CRIM. JUST., Summer 1994, at 12 (documenting the crisis in indigent defense and suggesting system-wide remedies).

89. See Spangenberg & Schwartz, *supra* note 88, at 14-15.

90. See Bright, *supra* note 3; Albert L. Vreeland, II, Note, *The Breath of the Unfed Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 636-50 (1991).

91. See *THE INDIGENT DEFENSE CRISIS*, *supra* note 88, at 2.

92. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

93. 1 *THE SPANGENBERG REPORT* (The Spangenberg Group, Newton, Mass.), Sept. 1994, at 1, 4. The Spangenberg Group, located in Newton, Massachusetts, specializes in indigent defense issues. It conducts studies of indigent defense systems and publishes a newsletter entitled *The Spangenberg Report*.

crime" political atmosphere, this appears unlikely to change.⁹⁴

Some challenges to the underfunding of state systems have been successful, but most have centered around the unreasonably low compensation provided to appointed attorneys or on the unreasonably low statutory caps on attorney compensation.⁹⁵ In addition to the lack of funding, the form of an indigent defense system itself often contributes to problems of attorney inexperience, lack of training, and overburdening.⁹⁶ These problems will be solved only when states restructure their defense systems to eliminate deficiencies in those systems or increase funding for indigent defense.⁹⁷ Any effort to reform these systems must begin with an understanding of the major forms of indigent defense systems and the problems associated with each type of system.

State indigent defense systems vary considerably in their organization.⁹⁸ In some states, each county chooses and monitors its own system.⁹⁹ In these states, different counties often use several different types of systems.¹⁰⁰ Other states have established a uniform statewide system and have created a state organization responsible for controlling it.¹⁰¹ Regardless of

94. BAR INFORMATION PROGRAM POST CONVICTION DEATH PENALTY REPRESENTATION PROJECT, AMERICAN BAR ASS'N, A COMPARISON OF PROSECUTION AND DEFENSE RESOURCES FOR CAPITAL LITIGATION 5 (1991).

95. See, e.g., *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984) (en banc) (holding that failures in the state contract system created an inference that the system produced inadequate representation and ordering the system to comply with certain standards); *White v. Board of County Comm'rs*, 537 So. 2d 1376, 1379 (Fla. 1989) (declaring state maximum fee cap of \$3500 unconstitutional when applied to interfere with the right to effective assistance of counsel in a capital case).

96. Thurgood Marshall commented on the need for attorneys handling capital cases to be better trained, noting that "[t]he bar must focus on improving the quality of trial counsel in capital cases, and must find resources to establish training and assistance for local attorneys appointed to handle capital cases." Marshall, *supra* note 3, at 4.

97. Spangenberg & Schwartz, *supra* note 88, at 15-16.

98. See, e.g., LEFSTEIN, *supra* note 85, at apps. a-g (describing the indigent defense systems of 50 states).

99. See, e.g., ALA. CODE §§ 15-12-2 to -4 (1982); GA. CODE ANN. § 17-12-37 (1990 & Supp. 1995).

100. See, e.g., ALA. CODE §§ 15-12-2 to -4; GA. CODE ANN. § 17-12-37.

101. See, e.g., ARK. CODE ANN. §§ 16-87-202, -206 (Miche Supp. 1993); COLO. REV. STAT. §§ 21-1-101, -103 (1986); CONN. GEN. STAT. ANN. §§ 51-289, -296 (West 1985 & Supp. 1995); DEL. CODE ANN. tit. 29, §§ 4601-4602 (1991). Most statewide indi-

whether a state uses a statewide system or a county-by-county system, the controlling organization must decide how it will structure that system to best provide for the area's needs. Although these systems differ among the states, almost all of them can be classified as one of three systems: assigned counsel or "ad hoc" systems, contract systems, and public defender systems.¹⁰² Some jurisdictions use a mixture of the different types of systems, with one system acting as the primary system and another acting as a secondary system for use in cases in which conflicts arise or the primary system is overburdened.¹⁰³

Ad Hoc or Assigned Counsel Systems

Three of the thirty-seven states with the death penalty use an assigned counsel system as their sole primary system.¹⁰⁴ Another twelve states use this system in at least some part of their primary system.¹⁰⁵ Nearly all of the states use this type of system as a secondary system to back up their primary system.¹⁰⁶

Under this system, judges appoint members of the private bar to represent indigent capital defendants.¹⁰⁷ In some systems, the judge appoints counsel based on personal knowledge of available attorneys, but, in others, attorneys are appointed from a list of attorneys willing to represent capital defendants.¹⁰⁸ Assigned counsel systems can be further subdivided according to

gent defense systems have created a public defender commission that promulgates rules and oversees the operation of smaller district public defender offices. Approximately 11 states employ this type of system, including Colorado, Connecticut, Delaware, Kentucky, Maryland, Missouri, New Hampshire, New Jersey, New Mexico, Ohio, and Wyoming. The Spangenberg Group, *A Study of Capital Representation in Texas* 122 (1993) [hereinafter *Texas Study*] (unpublished study on file with Author).

102. See David P. Cullen, *Indigent Defense Comparison of Ad Hoc and Contract Defense in Five Semi-Rural Jurisdictions*, 17 OKLA. CITY U. L. REV. 311, 320-23 (1992).

103. See LEFSTEIN, *supra* note 85, at 7; *Texas Study*, *supra* note 101, at 120-21.

104. *Texas Study*, *supra* note 101, at 121-22. These states include Alabama, Mississippi, and Texas. *Id.*

105. *Id.* These states are Arkansas, Georgia, Indiana, Montana, Nebraska, North Carolina, Oklahoma, Oregon, South Dakota, Utah, Virginia, and Washington. *Id.*

106. *Id.*

107. LEFSTEIN, *supra* note 85, at 8; Cullen, *supra* note 102, at 320.

108. Pauline Houlden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176, 177-78 (1985).

whether the appointing judge uses a list of qualified counsel, whether the list has separate levels of qualifications for different crimes, and whether a judge or county official is responsible for monitoring the performance of the system and the payment of attorneys.¹⁰⁹

The major problem with this type of system is that few attorneys are willing to accept capital cases because of the low pay and high time commitment required.¹¹⁰ As a result, judges often appoint inexperienced counsel who are incompetent to try complex capital cases.¹¹¹ In some cases, capital defendants have been represented at trial by appointed counsel who were unable to name more than two criminal-law decisions,¹¹² who referred to their clients using racial slurs,¹¹³ or who appeared to be drunk during most of the trial.¹¹⁴ These are just a few of the most egregious examples of attorney incompetence.¹¹⁵

109. *Id.* at 178.

110. *See, e.g.*, Bright, *supra* note 3, at 1844 (noting that, because of standard legal compensation, "few accomplished lawyers can be enticed to defend capital cases").

111. *See* Tyler v. Kemp, 755 F.2d 741, 746 (11th Cir.) (involving an attorney appointed to capital case six months after passing bar exam), *cert. denied*, 474 U.S. 1026 (1985); Douglas v. Wainwright, 714 F.2d 1532, 1555 (11th Cir. 1983) (describing how the judge had to take defense counsel into chambers and explain what the penalty phase was because trial counsel had never tried a capital case before), *vacated and remanded*, 468 U.S. 1206 (1984).

112. Stephen Bright tells the story of a capital defendant represented by an attorney at trial who was asked by the judge to name criminal-law decisions with which he was familiar. Bright, *supra* note 3, at 1839 (citing Transcript of Hearing of April 25-27, 1988, at 231, State v. Birt (Super. Ct. Jefferson County, Ga. 1988) (No. 2360)). The attorney named Miranda v. Arizona, 384 U.S. 436 (1966), and Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). Bright, *supra* note 3, at 1839. Evidently, the attorney was not aware that *Dred Scott* was not a criminal case. *Id.* n.32.

113. *See, e.g.*, Goodwin v. Balkcom, 684 F.2d 794, 805 n.13 (11th Cir. 1982) (defense counsel called the defendant "a little old nigger boy" during his closing argument), *cert. denied*, 460 U.S. 1098 (1983).

114. In People v. Garrison, 765 P.2d 419 (Cal. 1989) (en banc), the defendant filed a habeas corpus petition alleging, among other things, that counsel was ineffective at trial because he was intoxicated, *id.* at 440-41. Despite evidence given by the bailiff that counsel smelled of alcohol, evidence that counsel consumed large amounts of alcohol each day at the trial, and further evidence that counsel was arrested while driving to the courthouse for driving with a blood alcohol content of 0.27%, the court ruled that counsel's condition did not prejudice the defendant. *Id.*

115. Thurgood Marshall remarked that "[t]he federal reports are filled with stories of counsel who presented no evidence in mitigation of their client's sentences because

Texas is the only state that uses an assigned counsel system as its primary defense system.¹¹⁶ The Texas system has been described as being "substantially inadequate" due to its many problems.¹¹⁷ These problems typify the problems discussed above, which affect all assigned counsel systems to one degree or another.

In Texas, qualified attorneys are reluctant to volunteer for capital cases because of the complexity of the matters, the enormous time demands, the unavailability of support services, and the inadequate compensation paid by the state.¹¹⁸ A study of capital case representation in Texas concluded that:

[T]he situation in Texas can only be described as desperate. The volume of cases is overwhelming but the number of available attorneys remains limited. In the long run, the problem in Texas will not be solved by a voluntary program. Many lawyers are reluctant to take those cases which invariably require an enormous personal sacrifice without compensation. Other lawyers refuse to take additional cases after having experienced a whole range of problems with their most recent case or cases. Moreover, most lawyers are reluctant to participate because of the substantial complexity of the law.¹¹⁹

In many assigned counsel systems, including the Texas system, attorneys must meet no minimum qualification standards before they are allowed to try capital cases.¹²⁰ Due to the lack of such standards, a judge can appoint a lawyer who has no

they did not know what to offer or how to offer it, or had not read the state's sentencing statute." Marshall, *supra* note 3, at 2 (citations omitted). For a detailed discussion of the atrocious representation that many capital defendants receive, see Bright, *supra* note 3.

116. Texas Study, *supra* note 101, at 154.

117. *Id.* at 153.

118. *Id.* at 152; see also Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled To Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 370 (1993) (noting that often it is the trial judge who authorizes payment to the defense counsel rather than the defendant).

119. Texas Study, *supra* note 101, at ii.

120. See Stephen B. Bright et al., *Keeping Gideon from Being Blown Away*, CRIM. JUST., Winter 1990, at 10, 12-13; Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30, 31.

capital trial experience based on "subjective criteria" such as friendship or political support.¹²¹

Contract Systems

None of the states with the death penalty use a contract system as their sole means of providing representation to indigent defendants.¹²² Four states, however, use this system in conjunction with another system as part of their primary system.¹²³ Under these systems, a judge, county official, officer of the court, or a public defender contracts with a local bar association, a law school clinic, a public or private defender organization, a private law firm, or individual attorneys to provide legal representation for indigent defendants in a particular jurisdiction.¹²⁴ In many jurisdictions, these systems are used when the public defender's office has a conflict.¹²⁵ These systems can be further subdivided by analyzing whether the contract for legal services is awarded on the basis of competitive or noncompetitive bidding.¹²⁶

The main problem with contract systems is that the quality of representation suffers because of attempts to provide more cost-effective representation,¹²⁷ especially in systems in which the contract bidding is competitive and the contract is awarded to the lowest bidder.¹²⁸ The contracting agency is awarded the contract and paid its fee up front.¹²⁹ That agency is then responsible for budgeting its time and money to deal with the

121. Texas Study, *supra* note 101, at 55.

122. *See id.* at 121-22.

123. Idaho, Kentucky, Oregon, and Washington all use contract systems as part of their primary systems. *Id.*

124. Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 679-80 (1986); Robert Spangenberg et al., *Contract Defense Systems Under Attack: Balancing Cost and Quality*, NLADA BRIEFCASE, Fall 1992, at 5, 5-8.

125. Spangenberg et al., *supra* note 124, at 9-14.

126. *Id.* at 7.

127. "Contract bidding short-sightedly sacrifices the legal interests of the indigent on an alter [sic] of short-term dollar savings and is, therefore, unacceptable." *Id.* at 8.

128. Klein, *supra* note 124, at 680.

129. *Id.* at 680-81.

defense of all indigent defendants in criminal cases arising during the particular contract period.¹³⁰

Contract system attorneys, therefore, have a strong financial incentive to dispose of their cases quickly because trials will not increase payment but will decrease profits.¹³¹ Research has borne out this theory and has demonstrated that contract attorneys dispose of their cases more rapidly than private attorneys.¹³²

Some of the other problems associated with contract programs include: lack of fiscal or quality standards in the review of proposed contracts, improper and arbitrarily fixed ceilings on per case or per year costs, improper conflicts provisions creating a disincentive to withdraw in cases in which a conflict actually exists, private practice conflicts between the obligation to provide effective assistance of counsel to indigent clients and to money-making clients of the firm, and a lack of monitoring and evaluating mechanisms.¹³³ Furthermore, although ABA standards require contract systems to contain provisions ensuring that capital cases are handled by experienced attorneys, many programs do not include such provisions in their contracts.¹³⁴

Public Defender Programs

The majority of states with the death penalty employ a public defender system as their primary system for providing counsel to indigent capital defendants.¹³⁵ Some states have established

130. See Spangenberg et al., *supra* note 124, at 17.

131. Klein, *supra* note 124, at 680.

132. See Houlden & Balkin, *supra* note 108, at 199 ("In this study, the differences that did appear concerned speed of disposition and number of attorney appearances in court. Contract counsel made fewer appearances and processed cases more quickly.").

133. THE SPANGENBERG GROUP, A STUDY OF THE INDIGENT DEFENDER SYSTEM IN LOUISIANA 38-40 (1992) [hereinafter LOUISIANA STUDY]. One Arizona court evaluated the performance of contract systems while considering an ineffective assistance of counsel claim and found that the system had so many problems associated with it that it was very difficult for any capital defendant to receive an adequate defense. *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984) (en banc) (stating that "the system for obtaining indigent defense counsel in Mohave County militates against adequate assistance of counsel for indigent defendants").

134. LOUISIANA STUDY, *supra* note 133, at 14.

135. National Legal Aid & Defender Ass'n, *Statewide Defender Programs: The Lay*

a statewide public defender system in which a state public defender commission regulates and supervises the public defender offices in the different counties.¹³⁶ Others continue to allow counties to choose their systems, and some counties choose public defender systems. These systems may be funded by the state, the municipality, or both.¹³⁷ In these systems, full-time, salaried public defenders are appointed to represent indigent defendants. Ideally, these systems are preferable to private, assigned counsel systems because the attorneys are trained for indigent defense, and they can focus their attention on their indigent clients without worrying about making a profit.¹³⁸

Underfunding and case overloading plague public defender systems.¹³⁹ In 1990, the Spangenberg Group conducted a study of the Fulton County, Georgia, indigent defense system.¹⁴⁰ At that time, Fulton County primarily used a public defender system to provide indigent representation.¹⁴¹ The report concluded that there was insufficient staff, astronomical caseloads, no training, little supervision, severe support service deficiencies, and low morale.¹⁴² The heavy caseloads caused some attorneys to "cut corners" in their investigations and legal research.¹⁴³

of the Land app. B (1992) (unpublished document on file with Author); Texas Study, *supra* note 101, at 121-22.

136. See, e.g., ARK. CODE ANN. §§ 16-87-202, 206(f) (Michie Supp. 1993); COLO. REV. STAT. §§ 21-1-101, -103 (1986); CONN. GEN. STAT. ANN. §§ 51-289, -296 (West 1985 & Supp. 1995); DEL. CODE ANN. tit. 29, §§ 4601-4602 (1991).

137. See, e.g., The Spangenberg Group, Overview of the Fulton County, Georgia Indigent Defense System 5-6 (1990) [hereinafter Fulton County Study] (unpublished study on file with Author) (describing the sources of funds for the Fulton County public defender system).

138. Klein, *supra* note 118, at 390.

139. See THE INDIGENT DEFENSE CRISIS, *supra* note 88, at 7-8.

140. Fulton County Study, *supra* note 137.

141. Between 70 and 80% of all defendants were assigned to a county public defender. *Id.* at 24.

142. *Id.* at 42-45.

Because of the lack of training, experience and supervision, some trial public defenders have been faced with their first jury trial in a homicide or other extremely serious felony case. Some trial attorneys turn for help to the deputy chief public defender, the supervisor of appeals or another experienced attorney in the office. However, if they do not seek out the assistance, they will almost assuredly be on their own.

Id. at 28.

143. *Id.* at 26.

Another problem was the lack of coordination between the county public defender's office and other public defenders' offices.¹⁴⁴

Although these deficiencies are not present in every public defender system, they are indicative of the extreme problems that can plague such a system. Most public defender systems have insufficient resources and suffer at least some degree of work overload.¹⁴⁵

ALTERNATIVE SYSTEMS FOR PROVIDING ADEQUATE REPRESENTATION TO CAPITAL DEFENDANTS

Death penalty proponents and opponents both agree that the traditional forms of trial representation are not working to provide adequate representation to indigent capital defendants.¹⁴⁶ Capital cases, from an advocate's point of view, are some of the most difficult and complex cases in the legal system.¹⁴⁷ They involve a unique separate sentencing phase, a complex body of law that is specific to death cases, and complicated and convoluted doctrines that limit appellate review for errors committed at trial.¹⁴⁸ In the traditional trial systems discussed above, a private attorney or public defender without capital case experience commonly will represent indigent capital defendants.¹⁴⁹ The greatest flaw of the traditional systems is their failure to provide adequate training to attorneys who try death cases or to ensure that private attorneys have enough training or experience to

Some attorneys told us that they seldom conduct legal research and fail to file motions, again, even in situations where the result may be favorable to the defendant. One public defender told us, "I used to look hard for the one issue that I could use to win the case. I now look for the one issue that I can find to dispose of the case."

Id.

144. *Id.* at 37-38.

145. *Id.* at 45.

146. Berger, *supra* note 2, at 1673; see also TASK FORCE REPORT, *supra* note 8, at 70-71 (describing unanimity among representatives of states, victim's rights groups, and defense representatives that adequate counsel must be provided at the trial level).

147. One commentator has noted that capital trials are "the most technically difficult form of litigation known to the American legal system." Vreeland, *supra* note 90, at 645.

148. See Coyle et al., *supra* note 120, at 31.

149. See *supra* notes 92-139 and accompanying text.

handle those cases properly¹⁵⁰

Some states have attempted to reform these systems to ensure that trial counsel are trained in the complexities of capital defense or at least have a minimum level of experience in trying capital cases.¹⁵¹ These states have begun adopting minimum standards that attorneys must satisfy before they can be appointed to represent an indigent capital defendant at trial.¹⁵² Others have developed specialized capital trial units consisting of attorneys who are specially trained in capital defense and who focus exclusively on providing representation to indigent capital defendants at the trial level.¹⁵³ Both of these new provisions are designed to provide better representation to indigent capital defendants at the trial level, but each has strengths and weaknesses when used alone.¹⁵⁴ Ultimately, the best system is a combination of the two—a system in which primary representation is by a capital trial unit, and secondary representation is by private attorneys who meet a set of minimum guidelines for capital representation.¹⁵⁵

*State Capital Trial Units*¹⁵⁶

A number of states with the death penalty have set up special units within their defense systems to deal specifically with indigent capital defendants.¹⁵⁷ These special units are generally composed of attorneys who are experienced capital counsel familiar with the complex law and procedure involved in trying capital cases.¹⁵⁸ Ideally, all indigent capital defendants in a state would be represented at trial by members of the capital trial unit.¹⁵⁹ The responsibilities and structure of these units

150. See Coyle et al., *supra* note 120, at 30.

151. 1 THE SPANGENBERG REPORT, *supra* note 93, at 9-12.

152. See, e.g., IND. R. CRIM. P. 24; OHIO C.P. SUP. R. 65.

153. 1 THE SPANGENBERG REPORT, *supra* note 93, at 9-12.

154. See *infra* notes 150-64, 254-68 and accompanying text.

155. See *infra* notes 268-74 and accompanying text.

156. States have different names for these types of units, but, throughout this article, the term "capital trial units" is used generically to denote any state unit established to defend indigent capital defendants.

157. States with some form of these units include Arkansas, Connecticut, Georgia, and Oklahoma. 1 THE SPANGENBERG REPORT, *supra* note 93, at 9-12.

158. See *infra* notes 164-220 and accompanying text.

159. Some capital trial units, such as the Missouri Capital Litigation Unit, defend

vary somewhat from state to state, but most of the units exist as part of a statewide public defender office.¹⁶⁰

For several reasons, the capital trial unit system is much more effective than any of the traditional systems in providing an adequate defense to an indigent capital defendant. First, the complexity of death penalty defense work makes it analogous to a medical specialty.¹⁶¹ To ensure that indigent defendants receive a competent defense, the system must provide them with attorneys who have specialized expertise in this technical and complicated area.¹⁶² Capital trial unit attorneys are such spe-

every indigent capital defendant in the state. Telephone Interview with Kevin Curran, Division Director, Missouri Capital Litigation Unit (Feb. 21, 1995) [hereinafter Curran Interview]. Other units, such as the Arkansas Capital Conflicts and Appeals Office, only represent capital indigent defendants when there are no qualified public defenders. Telephone Interview with Didi Sallings, Director, Arkansas Capital Conflicts and Appeals Office (Feb. 20, 1995) [hereinafter Sallings Interview]. For a discussion of these two systems, see *infra* notes 187-214 and accompanying text.

One interesting twist on the idea of capital trial unit representation is the possibility that these units could become involved in death penalty trials only to represent the defendant during the penalty phase, which is the most complicated and unique part of the trial for nonspecialists. Unfortunately, while this would allow the unit to be involved in more cases and possibly would reduce the cost of the unit, the representation would suffer because, to be effective, any theme or defense that would be offered during the penalty phase must be presented to the jury during the trial. Telephone Interview with Kelly Gleason, Assistant Public Advocate, Kentucky Capital Trial Unit (Feb. 22, 1995) [hereinafter Gleason Interview]. For example, if, during the penalty phase, the capital trial unit attorney relies on the argument that the defendant is mentally retarded, the failure of co-counsel to bring this to light during the trial may make the argument ineffective. *Id.*

160. Curran Interview, *supra* note 159; Gleason Interview, *supra* note 159; Sallings Interview, *supra* note 159.

161. Two capital trial unit attorneys analogized their practice to that of "medical specialists." Gleason Interview, *supra* note 159; Sallings Interview, *supra* note 159.

162. An experienced former death penalty litigator noted that capital cases cannot be adequately handled by nonspecialists, stating that "[i]t's not that the lawyer gets into a trial and offers less skill than he is capable of giving. But it would be just like appointing me to play for the Chicago Bulls—it's beyond my capability." Coyle et al., *supra* note 120, at 31 (quoting Atlanta attorney Millard Farmer Jr.). Another attorney has remarked that "I got on the [capital appointment] list my second year out of school because I won some tough cases and some respect. Well my client got executed. I specialized in criminal defense, but I'll tell you what: this is not criminal defense." *Id.* (quoting Mississippi attorney James Bell).

One should also note that the offices of many state attorneys general have several attorneys who specialize in prosecuting capital cases. Gleason Interview, *supra* note 159. Without corresponding capital defense specialists, the playing field is uneven.

cialists.¹⁶³ Second, the system is more cost-effective than present systems because, by investing in capital trial units, states can take a step toward reducing the number of constitutional errors at trial. Fewer constitutional errors at trial in turn result in fewer expensive retrials. The system thus saves money.¹⁶⁴ Third, these systems reduce the number of ineffective assistance of counsel claims granted during habeas review because trials are conducted by defense counsel who are experienced and competent enough to avoid making glaring errors.¹⁶⁵ Reducing these claims not only restores public faith in the justice system but may also solve the problem of delay during habeas review—a delay that Congress has sought to correct by setting time limits on the process.¹⁶⁶ Fourth, the existence of capital trial units may discourage prosecutors from seeking the death penalty in borderline cases, thus further reducing the number of capital cases in the habeas corpus process.¹⁶⁷

Although this system appears attractive, there are two reasons why states may be reluctant to adopt it. First, most of the states that have capital trial units use them as part of a statewide public defender system.¹⁶⁸ Many states, however, still use a county-by-county system with public defender systems and assigned counsel or contract systems existing side-by-side in the same state.¹⁶⁹ At present, those states may not have a state-

163. Gleason Interview, *supra* note 159; Sallings Interview, *supra* note 159.

164. See Coyle et al., *supra* note 120, at 30.

165. Sallings Interview, *supra* note 159.

166. See *supra* notes 40-78 and accompanying text. In its most recent habeas reform bill, Congress failed even to address the issue of representation at the trial level, focusing instead on the postconviction level. H.R. 729, *supra* note 7, § 2256.

167. Since [the creation of the Oklahoma capital trial unit], the number of capital convictions has dropped dramatically. Oklahoma prosecutors now seek the death penalty less frequently than they know they'll face aggressive defense lawyers and no prosecutor wants to lose a capital case. So borderline death-row convictions are less likely to happen, which means those cases won't have to go through the tortuous appeals process, gobbling up money and court time.

Naftali Bendavid, *Habeas Reform's Defeat Reveals Divisive Debate*, RECORDER, May 16, 1994, at 1.

168. Curran Interview, *supra* note 159; Gleason Interview, *supra* note 159; Sallings Interview, *supra* note 159.

169. See, e.g., ALA. CODE §§ 15-12-2 to -4 (1982); GA. CODE ANN. § 17-12-37 (Michie 1990 & Supp. 1995).

wide public defender office in which they can establish the unit. This problem, however, probably could be solved if the state were willing to directly fund a capital trial unit, bypassing the whole notion of a statewide public defender system. Second, some states also may be unwilling to adopt this system because they deem it an extreme response if they have only a few death cases every year. If the unit were part of an existing public defender system, however, members of the unit could work exclusively on the few death cases that arose. If no death cases arose, they could become active in the regular work of the public defender offices.

Although some states might be reluctant to establish such a unit, several states that have established this type of system are finding it to be more effective at providing competent representation to capital defendants than were their previous systems.¹⁷⁰ Kentucky, Arkansas, Missouri, and New York have set up different forms of capital trial units, and these units are roughly illustrative of some of the major forms that this concept has taken to date.

Kentucky

Kentucky uses a "hometown representation" capital trial unit system. The state has a statewide public defender system to provide indigent defense services, which is supervised and controlled by the Department of Public Advocacy.¹⁷¹ Within the Department of Public Advocacy, a capital trial unit was created in 1990.¹⁷² The unit currently has two attorneys and handles about six to ten death cases at any one time. The state usually has about seventy death cases a year.¹⁷³

Unlike other systems, in which all indigent capital defendants are represented by an attorney in the capital trial unit, the Kentucky unit only represents capital defendants when no pub-

170. Curran Interview, *supra* note 159; Gleason Interview, *supra* note 159; Sallings Interview, *supra* note 159.

171. See KY. REV. STAT. ANN. § 31.010 (Baldwin 1992).

172. Gleason Interview, *supra* note 159.

173. *Id.*

lic defender is able to handle the case.¹⁷⁴ The result is that the capital trial unit only represents capital defendants in rural counties that have no public defender office.¹⁷⁵ If the unit has more than ten to twelve cases at any one time, it will contract with private attorneys to represent other defendants.¹⁷⁶

Although local, "hometown" public defenders represent most of the capital defendants, they must satisfy no standards before being permitted to take the case.¹⁷⁷ The capital unit, however, monitors the performance of all attorneys in death penalty cases and has the power to remove public defenders from cases if they are not competent.¹⁷⁸ In addition, if the unit is forced to contract with private attorneys, it requires the attorneys to meet the ABA Guidelines for the appointment and performance of counsel in death penalty cases¹⁷⁹ and makes compliance a term in the contract.¹⁸⁰

The unit has significantly reduced the number of death sentences handed down.¹⁸¹ Since its establishment, the capital trial unit has never had a death sentence imposed on a client whom it represented.¹⁸² The unit has had problems, however, with the quality of representation provided by some public defenders and by contract and private attorneys.¹⁸³

Overall, this type of "hometown representation" unit system appears to do an excellent job of providing direct representation to indigent capital defendants.¹⁸⁴ Although there is no guarantee that public defenders, contract attorneys, or private attorneys have the training, competence, or expertise necessary to provide adequate representation, the unit nevertheless appears to be able to control this problem by carefully monitoring

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. See *infra* notes 222-54 and accompanying text for a discussion of these guidelines.

180. Gleason Interview, *supra* note 159.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

attorneys' performance and by removing incompetent counsel.¹⁸⁵ Nevertheless, a system of standards requiring private attorneys to have specific knowledge of death penalty law and procedure might eliminate situations in which the unit has to remove an attorney during the trial process.¹⁸⁶

Arkansas

Arkansas employs a "qualified hometown representation" type of capital trial unit system. The state has a statewide public defender system to provide indigent defense services.¹⁸⁷ The Capital Conflicts and Appellate office was created by statute in 1993 as part of the public defender commission.¹⁸⁸ In February 1995, the office had five attorneys in the unit and was handling twenty-seven death penalty cases.¹⁸⁹

When an indigent defendant is charged with a capital crime in Arkansas, he is defended by a public defender who satisfies the Arkansas minimum qualification standards.¹⁹⁰ These standards are not as strict as the ABA standards, but they require significant felony trial experience and some capital case experience.¹⁹¹ If there are no qualified public defenders in a particular jurisdiction, the unit attorneys will try the case.¹⁹² If no qualified public defenders are available and the unit has too many cases, a private attorney who meets the qualification standards will be appointed.¹⁹³

Arkansas's implementation of this system has resulted in "cleaner and better argued" trials.¹⁹⁴ Because very few public defenders satisfy the standards, the unit tries most of the capital cases in the state.¹⁹⁵ The only problem that this unit has

185. *Id.*

186. See *infra* notes 260-70 and accompanying text.

187. ARK. CODE ANN. § 16-87-202 to -203 (Michie Supp. 1993).

188. *Id.* § 16-87-205.

189. Sallings Interview, *supra* note 159.

190. *Id.*

191. *Id.* For a detailed discussion of state standards for the appointment of counsel in death penalty cases, see *infra* notes 220-70 and accompanying text.

192. Sallings Interview, *supra* note 159.

193. *Id.*

194. *Id.*

195. *Id.*

experienced is that the unit attorneys encounter a certain degree of hostility when they defend an indigent capital defendant in a town where the prosecutor is well-acquainted with the judge.¹⁹⁶

In general, this system combines the use of standards and a capital trial unit to provide competent representation.¹⁹⁷ Allowing qualified local public defenders to represent indigent capital defendants makes full use of a local defender's knowledge of local customs and "home rules" to the benefit of the defendant.¹⁹⁸ Under this system, however, the standards employed are very important.¹⁹⁹ If the unit carefully monitors the appointment of public defenders to ensure that they meet the standards and are qualified, the system probably will be very effective.²⁰⁰ If, however, another state adopted this system and implemented standards so lenient that everyone was qualified to try capital cases, the advantages of having a capital trial unit would disappear because almost all attorneys would be "qualified" and the unit would never try any cases. If standards accompany such a capital trial unit, they must be strict enough to ensure that qualified counsel are as capable as the attorneys in the capital unit and that the unit can monitor the qualification process to ensure compliance with the standards.²⁰¹

Missouri

Missouri uses a "pure capital unit" type of capital trial unit system. The state has a statutory statewide public defender commission.²⁰² The Missouri Capital Litigation Unit was created informally within the public defender commission in

196. *See id.*

197. *Id.*

198. *See id.*

199. Some commentators have criticized standards based solely on the number of years of trial practice as ineffective in ensuring that counsel have enough actual knowledge of death penalty law and procedure to provide competent representation. *See* TASK FORCE REPORT, *supra* note 8, at 217-19 (Minority Report of Stephen B. Bright); *infra* notes 254-59 and accompanying text.

200. *See* TASK FORCE REPORT, *supra* note 8, at 217-19 (Minority Report of Stephen B. Bright).

201. *Id.*

202. MO. ANN. STAT. §§ 600.015, .017, .019 (Vernon 1995).

1989.²⁰³ The unit has three offices and seventeen attorneys and currently is handling sixty-five to seventy cases.²⁰⁴

The capital litigation unit defends *all* indigent capital defendants at the trial level, except in rare instances when a conflict emerges.²⁰⁵ In conflict cases, the unit appoints a private attorney from a list of attorneys whom members of the unit know to be qualified.²⁰⁶ The state presently has no system of standards for the appointment of counsel in death penalty cases but is considering adopting standards to cover the rare instances when a private attorney is appointed.²⁰⁷

The unit has performed effectively since its creation in 1989. The year before the unit was established, thirteen capital defendants were sentenced to death.²⁰⁸ Since the unit started, no more than five capital defendants have been sentenced to death in any one year, and ninety percent of all capital cases are resolved without a death sentence.²⁰⁹

Although the unit has been very effective, ineffective assistance claims are still granted occasionally, but obvious errors are no longer a problem.²¹⁰ The unit has no formal training program but presently uses an apprentice system coupled with intensive training seminars to train its staff attorneys.²¹¹

Overall, this system provides excellent representation to indigent capital defendants. The system is a "pure" capital trial unit system in the sense that a specialist in capital cases represents every indigent capital defendant. Only in very rare conflict cases are private attorneys used for capital cases.²¹² To the extent that this system provides every indigent capital defendant with representation by a unit attorney, it is by far the best of the various capital trial unit systems. Because the unit cannot rep-

203. Curran Interview, *supra* note 159.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

resent defendants in all of the cases that arise every year,²¹³ however, Missouri should create standards detailing the qualifications that private counsel must meet in order to be appointed in an "overflow" case.²¹⁴

New York

The State of New York reinstated the death penalty in 1995 after intense debate about the wisdom of the penalty and procedures needed to ensure its fair application.²¹⁵ Although opponents of the death penalty could not block passage of the law, they succeeded in forcing the legislature to include provisions relating to the appointment of counsel for indigent death-eligible defendants.²¹⁶ Specifically, the law provides for a Capital Defender Office to be responsible for overseeing the defense of indigent capital defendants.²¹⁷

Three board members chosen by the chief judge of the Court of Appeals, the president of the senate, and the speaker of the assembly govern the Capital Defender Office.²¹⁸ The board has the authority to appoint a Capital Defender, and the Capital Defender may consult with the board and hire staff attorneys, investigators, and other support staff.²¹⁹ The Capital Defender Office is responsible for: selecting attorneys to represent indigent capital defendants at the trial level or defending the indigent defendants themselves; providing advice, investigative services, and experts to attorneys representing capital defendants; devising a set of minimum standards for use in appointing non-unit attorneys to represent indigent capital defendants; training attorneys; and contracting with legal organizations to

213. *Id.*

214. *See infra* notes 260-70 and accompanying text for proposed standards.

215. *See generally* James Dao, *New York Leaders Offer Limited Bill on Death Penalty*, N.Y. TIMES, Mar. 4, 1995, at A1 (discussing compromises agreed to by opponents and proponents of the death penalty); Kevin Sack, *New York's Fight on Death Penalty Shifts to Courts*, N.Y. TIMES, Jan. 8, 1995, at A1 (discussing the debate over the death penalty).

216. Dao, *supra* note 215, at A1.

217. N.Y. JUD. LAW §§ 35-b(3), -b(8) (Consol. Midyear Supp. 1995).

218. *Id.* § 35-b(3).

219. *Id.* § 35-b(4)(a).

provide representation to indigent capital defendants in a particular jurisdiction.²²⁰

According to the law, an indigent faced with a capital crime is entitled to two attorneys.²²¹ The Capital Defender Office must submit a list of four possible defense teams to the trial judge or may elect to represent the defendant itself.²²² In jurisdictions in which the Capital Defender Office has contracted with a legal organization to undertake the defense of indigent capital defendants, the organization is charged with the representation.²²³ If the Capital Defender Office does not submit the names of qualified attorneys and does not undertake representation, the trial judge may appoint attorneys whose names appear on a list of qualified attorneys who have satisfied the standards set by the Capital Defender Office.²²⁴

Although an examination of the text of the law is useful to determine the theoretical design of the defense system, how the Capital Defender Office will operate in practice is unclear because of the recency of the law's passage. For example, because the law does not require the Capital Defender Office to represent all indigent capital defendants,²²⁵ it is unclear if the office will defend most capital defendants or if it will appoint private attorneys to defend the majority of capital defendants.²²⁶

This system combines the use of qualification standards and a capital trial unit.²²⁷ It resembles Arkansas's "qualified hometown representation" system because it provides for either the appointment of attorneys who meet the minimum standards or representation by members of the Capital Defender Office.²²⁸ The effectiveness of this system will depend, to a great extent, on the quality of the standards set by the Defender Office. If

220. *Id.* § 35-b(4)(b).

221. *Id.* § 35-b(2).

222. *See id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. In all likelihood, this depends upon the size of the unit and the number of death penalty trials each year. The law likely was drafted with this intentional flexibility because neither of these numbers was known at the time of drafting.

227. *Id.* §§ 35-b(2) to -b(5).

228. *See supra* notes 187-201 and accompanying text.

most indigent capital defendants are represented by appointed attorneys, and those attorneys are required to meet minimal standards based only on years of experience, the system may not be very effective, despite the existence of a Capital Defender Office.²²⁹ If, however, the Capital Defender Office sets high standards based on ability and experience and represents all indigent defendants unless there is a conflict, the system may work extremely well. Ultimately, the effectiveness of this system will depend on how it is applied.

Qualification Standards for Attorneys Representing Capital Defendants

Instead of, or in conjunction with, establishing a capital trial unit to provide better representation to indigent capital defendants, some states have created minimum qualification standards that attorneys must meet in order to represent indigent capital defendants.²³⁰ These standards are designed to ensure that indigent capital defendants are represented by competent counsel with capital case experience.²³¹ The ABA has recognized the need for such standards and has formally encouraged the states to adopt standards.²³² In 1989, the ABA drafted a set of model guidelines for the appointment and performance of counsel in death penalty cases.²³³ Additionally, the most recent habeas corpus reform bill, the Effective Death Penalty Act,²³⁴ includes a section requiring states to use a set of minimum stan-

229. For a discussion of the problems associated with a standards-based system, see *infra* notes 254-59 and accompanying text. Interestingly, the law also allows the Capital Defender Office to make contracts for the defense of indigent capital defendants in a particular jurisdiction despite the problems associated with contract defense systems. N.Y. JUD. LAW § 35-b(4)(vi).

230. See, e.g., IND. R. CRIM. P. 24; OHIO C.P. SUP. R. 65; Virginia State Bar, *Public Defender Commission Adopts Standards for the Appointment of Counsel in Capital Cases*, VA. LAW. REG., Apr. 1992, at 8, 8 [hereinafter *Public Defender Commission Adopts Standards*].

231. See ABA GUIDELINES, *supra* note 74, at 31-39. The Supreme Court of Ohio adopted the first set of such standards in 1987. 1 THE SPANGENBERG REPORT, *supra* note 93, at 11.

232. ABA GUIDELINES, *supra* note 74; see TASK FORCE REPORT, *supra* note 8, at 61-71.

233. See ABA GUIDELINES, *supra* note 74.

234. See *supra* notes 44-64 and accompanying text.

dards for the appointment of postconviction counsel in order to qualify for the habeas time limits.²³⁵

All states should adopt some form of standards for several reasons. First, although states with the death penalty use different indigent defense systems, all of those systems suffer from the same problem—inexperienced and unqualified attorneys regularly trying capital cases to the detriment of the individual defendant and the system as a whole.²³⁶ By adopting standards, states can improve the quality of representation without making drastic alterations in their existing systems.²³⁷ Second, the adoption of standards is a relatively inexpensive way for the states to begin to reform their systems because no extensive cash outlay is necessary.²³⁸ Third, standards can be used in systems with capital trial units in cases in which a unit attorney does not represent an indigent capital defendant due to case overload or conflict.²³⁹

Even if states agree that the adoption of minimum standards is a good idea, a great deal of disagreement remains over what the standards should look like.²⁴⁰ The ABA standards focus on the attorney's experience in trying serious criminal cases, specifically focusing on the number of years that she has practiced and the number of capital cases in which she has been involved.²⁴¹ In contrast, some commentators have argued that qualification standards should focus on an attorney's knowledge of death penalty jurisprudence and trial advocacy skills, in addition to experience.²⁴² Regardless of this view, however, almost

235. See *supra* notes 44-64 and accompanying text.

236. See generally TASK FORCE REPORT, *supra* note 8, at 63-71 (describing the problems caused by attorney inexperience and incompetence).

237. Most states that use standards have some type of organization that oversees compliance with the standards or "certifies" attorneys as qualified. See, e.g., OHIO C.P. SUP. R. 65. To ensure that standards are meaningful and that jurisdictions are complying with them, states must adopt some form of oversight organization.

238. See 1 THE SPANGENBERG REPORT, *supra* note 93, at 12 (noting that states that do not have funds to establish a capital trial unit may consider setting up standards instead).

239. *Id.* at 11-12.

240. Bendavid, *supra* note 167, at 1.

241. ABA GUIDELINES, *supra* note 74, at 55-61.

242. TASK FORCE REPORT, *supra* note 8, at 217-19 (Minority Report of Stephen B. Bright).

all of the states that have adopted standards have followed the ABA "experiential" model.²⁴³

To assess the potential effectiveness of such experiential standards, one must examine the permutations of these standards that different states have developed. The major areas in which the states differ are: whether they require one or two attorneys for a capital case, whether the standards are accompanied by a certification board or other organization to ensure compliance, whether they cover only the appointment of counsel or extend to performance of counsel as well, and the actual number of years experience and the type of experience required.²⁴⁴

Virginia, Indiana, and Ohio have not established capital trial units within their systems, but they each have adopted a set of standards for the appointment of counsel in capital cases.²⁴⁵ Comparing these standards to the ABA guidelines demonstrates some of the different approaches that have been taken in this area.

The ABA standards are by far the strictest and most all-encompassing set of standards.²⁴⁶ They cover the appointment of counsel at trial, appeal, and during postconviction review, and they outline performance requirements at all stages of the representation.²⁴⁷ The standards require that two attorneys be appointed to each capital case,²⁴⁸ that each jurisdiction establish an "appointing authority" to ensure that the standards are complied with,²⁴⁹ and that each jurisdiction establish lists of attorneys qualified to serve as capital counsel.²⁵⁰ The standards also include provisions relating to training, compensation,

243. See, e.g., IND. R. CRIM. P. 24; OHIO C.P. SUP. R. 65; *Public Defender Commission Adopts Standards*, *supra* note 230, at 8.

244. Compare IND. R. CRIM. P. 24 with OHIO C.P. SUP. R. 65.

245. IND. R. CRIM. P. 24; *Public Defender Commission Adopts Standards*, *supra* note 230, at 8; Telephone Interview with Sean Heasley, Assistant State Public Defender, Ohio Public Defender Office (Feb. 24, 1995) [hereinafter Heasley Interview].

246. Heasley Interview, *supra* note 245.

247. ABA GUIDELINES, *supra* note 74, at 3-28.

248. *Id.* at 3.

249. The standards suggest that this should be an organized body, such as a public defender commission or, in the alternative, that a committee of attorneys should be appointed to adopt standards and procedures for the appointment of counsel in capital cases. *Id.*

250. *Id.* at 4.

workload, and support services.²⁵¹ Finally, they require trial experience and some experience trying capital cases.²⁵²

In contrast, state standards usually cover only the appointment of counsel and do not deal with matters such as performance or compensation.²⁵³ Some state standards, such as those adopted by Virginia, recommend, but do not require, that two attorneys be appointed to every capital case.²⁵⁴

The state standards differ most dramatically from the ABA guidelines in regard to their requirements for attorney experience. The ABA guidelines require the lead counsel in a capital case to have at least five years of experience in criminal defense litigation, prior experience in at least nine jury trials of a serious and complex nature, of which at least three should have been for murder or aggravated murder, and experience as counsel in at least one prior capital case.²⁵⁵ The guidelines also require the attorney to have attended and completed a capital defense training program within one year of his appointment.²⁵⁶

Indiana adopts all of these requirements, except that counsel need only have experience in five felony trials that were tried to completion and counsel is only required to have completed a training course within two years of appointment.²⁵⁷ The Ohio standards require lead counsel attorneys to have experience in at least one prior capital case but are considerably less rigid in the number of prior felony cases an attorney must have tried.²⁵⁸ An attorney can satisfy the standards if he acted as lead counsel and completed one jury trial involving a murder or

251. *Id.* at 65-67, 73-83.

252. *Id.* at 4.

253. Compare OHIO C.P. SUP. R. 65 (detailing requirements for appointment but not outlining guidelines for performance once appointed) with ABA GUIDELINES, *supra* note 74 (outlining both appointment standards and performance guidelines).

254. The standards state: "While Section 19.2-163.7 of the Virginia Code does not require more than one attorney, the appointment of two attorneys is strongly urged for trial, appellate and habeas proceedings." *Public Defender Commission Adopts Standards*, *supra* note 230, at 8.

255. ABA GUIDELINES, *supra* note 74, at 5.

256. *Id.* at 6.

257. IND. R. CRIM. P. 24.

258. OHIO. C.P. SUP. R. 65.

aggravated murder charge.²⁵⁹ Finally, under the Virginia standards, lead counsel must have five years of criminal litigation experience, must have completed specialized capital defense training within two years of the appointment, and must have experience as lead counsel in a capital case, experience as co-counsel in at least two capital cases, or experience as lead counsel in five felony cases involving crimes that carry a minimum sentence of five years or more.²⁶⁰

Another important difference among state standards is the type of organization by which the state monitors the appointment and performance of appointed counsel. Both Virginia and Indiana have public defender commissions that maintain lists of private attorneys eligible to try capital cases.²⁶¹ When a capital case arises, the judge appoints an attorney from the list.²⁶² In Ohio, the public defender commission has created a committee of attorneys to draft a similar list and has charged the committee with the responsibility of reviewing the list periodically and removing the names of attorneys who no longer meet the qualifications.²⁶³

Problems with Standards

Although standards are a means of ensuring the provision of competent counsel to indigent defendants at the trial stage, the adoption of such standards does not completely ensure that the standards will be followed and that the quality of representation will improve. Standards that are based solely on the number of years the attorney has been in practice and that do not set up an organization to recruit, train, and assign attorneys to capital cases probably will not help to improve an indigent defense system.²⁶⁴ Standards based on the number of years counsel has

259. *Id.*

260. *Public Defender Commission Adopts Standards*, *supra* note 230, at 8.

261. IND. R. CRIM. P. 24; *Public Defender Commission Adopts Standards*, *supra* note 230, at 8.

262. IND. R. CRIM. P. 24; *Public Defender Commission Adopts Standards*, *supra* note 230, at 8.

263. OHIO C.P. SUP. R. 65 (III)(G).

264. *See* TASK FORCE REPORT, *supra* note 8, at 217-19 (Minority Report of Stephen B. Bright).

practiced do not measure counsel's "actual ability to discharge the responsibilities of defending a capital case."²⁶⁵

Instead of setting standards based on the number of years of practice, the standards should require demonstrated knowledge of death penalty law, litigation management skills, trial advocacy skills, and knowledge and understanding of the guilt and penalty phases of a capital trial.²⁶⁶ Without requiring such actual knowledge, an incompetent attorney who has tried several criminal cases, either competently or incompetently, might satisfy the standards while a less experienced attorney well-versed in capital case law and procedure may not qualify.²⁶⁷

Enforcement poses another potential problem. If no organization is set up to ensure that the standards are complied with, it does not matter how strict they are.²⁶⁸ States must adopt procedures to ensure compliance with the standards.²⁶⁹

Improving Qualification Standards

Instead of focusing on attorney experience, qualification standards should focus on an attorney's knowledge of death penalty law and trial advocacy skills.²⁷⁰ While experience should remain a factor in determining whether an attorney is qualified to represent a death-eligible defendant, it should not be the only factor. If experience is the only factor, then an attorney who has represented countless death-eligible defendants incompetently may qualify to continue representing them poorly, while a relatively young attorney, who is very knowledgeable and competent in death penalty law, would not be able to represent a death-eligible defendant.²⁷¹

Unlike current qualification standards that focus on the quantity of experience and not the quality of the experience, knowledge of death penalty law and procedure can be tested objective-

265. *Id.* at 217 (Minority Report of Stephen B. Bright).

266. *Id.* at 217-19 (Minority Report of Stephen B. Bright).

267. Bright, *supra* note 3, at 1871 n.209.

268. TASK FORCE REPORT, *supra* note 8, at 219 (Minority Report of Stephen B. Bright).

269. *Id.* at 218-19 (Minority Report of Stephen B. Bright).

270. *Id.* at 217-19 (Minority Report of Stephen B. Bright).

271. Bright, *supra* note 3, at 1871 n.209.

ly²⁷² Qualification standards should require attorneys to pass a written exam testing their knowledge of death penalty law and procedure. This requirement would ensure that all attorneys representing death-eligible defendants understand the unique and complex subtleties of death penalty jurisprudence and have the knowledge necessary to represent their clients effectively. The test should be devised and administered by the organization responsible for overseeing the certification of attorneys to represent indigent death-eligible defendants.²⁷³

In addition to testing the attorney's knowledge, the standards should require an attorney to demonstrate competence in trial advocacy skills.²⁷⁴ Although trial experience may be some measure of competence in trial advocacy, the unique bifurcated nature of death penalty trials demands that attorneys understand and appreciate the skills necessary to perform competently in the penalty phase of the trial as well as in the guilt phase. To ensure that attorneys have competent trial advocacy skills, they should be required to attend and complete a training seminar on trial advocacy in capital trials.²⁷⁵ At the conclusion of the session, the attorneys should be required to engage in a mock capital trial to demonstrate competence in trial advocacy.

Even if these improved standards are implemented and a state establishes a satisfactory set of standards, it does not necessarily follow that the system will improve. Judges might be unwilling to follow such standards when selecting attorneys or, in some areas, there might be no attorneys who qualify under the standards.²⁷⁶ The differences in the strictness of state standards can be attributed, in part, to difficulties in

272. One commentator has argued that the Sixth Amendment definition of counsel should be narrowed to include only qualified counsel and has suggested that "courts might test lawyers to determine whether they possess the requisite skill and knowledge, just as candidates are now examined to receive a general license to practice law." Green, *supra* note 34, at 510.

273. *Id.* at 507-15.

274. *See id.*

275. *See id.*

276. "Despite the statutory guideline that attorneys appointed to capital cases must have five years of experience, one attorney told the committee in Shreveport, that he got his first capital case after he had been practicing 'for seven months.'" LOUISIANA STUDY, *supra* note 133, at 32.

attracting qualified volunteers to represent indigent capital defendants for low pay.²⁷⁷ Because attorneys often are reluctant to represent capital defendants, excessively strict standards may result in no qualified attorneys being available.²⁷⁸ In contrast, if the standards are too lax, they will not improve the quality of representation.

That some counties or jurisdictions simply may not have qualified attorneys who are willing to take the cases because of the time and expense involved is a problem.²⁷⁹ Even if some attorneys are qualified, there may not be enough to represent the number of capital defendants in the area.²⁸⁰ All of these problems demonstrate that standards should not be the sole means of administering a system. Instead, they should be used in conjunction with a capital trial unit system.

The Ideal System

The best system for ensuring that indigent death-eligible defendants receive adequate representation is a combination of capital trial units and qualification standards. Ideally, all states with the death penalty should establish capital trial units consisting of attorneys with specialized knowledge and experience in capital cases. These units should be responsible for defending all indigent death-eligible defendants in the state at trial and on appeal.²⁸¹ This system would ensure that all indigent death-eligible defendants received adequate representation at the trial level.

In addition, capital trial units should be responsible for devising qualification standards to be used in appointing attorneys in

277. See TASK FORCE REPORT, *supra* note 8, at 196 (Minority Report of Malcolm M. Lucas).

278. *Id.* at 197 (Minority Report of Malcolm M. Lucas).

279. *Id.* (Minority Report of Malcolm M. Lucas).

280. *Id.* (Minority Report of Malcolm M. Lucas).

281. Some existing capital trial units only represent indigent defendants if a public defender or other qualified attorney is unavailable. See *supra* notes 164-92 and accompanying text. This process seems to defeat the purpose of having capital trial specialists. Although situations may arise in which other attorneys may have to take some capital cases, attorneys in the unit should represent indigent capital defendants so that the defendants may benefit from the specialized knowledge and competence of the trial unit attorney.

circumstances in which the unit has a conflict or when unit attorneys are overloaded and unable to represent a defendant. The qualification standards should focus on attorney knowledge of death penalty law and procedure, experience, and trial advocacy skills.²⁸² In addition to establishing standards, the capital trial unit should be responsible for devising tests and exams, conducting training seminars, certifying attorneys as qualified, monitoring attorney performances in capital cases, and removing attorneys who do not perform competently.

The key to the effectiveness of this system is that it would be organized and run by people with specialized knowledge about death penalty law and procedure. In contrast to present systems in which appointed attorneys know little about the complex body of death penalty law and procedure or in which attorneys are appointed or certified by judges and public defender organizations unfamiliar or unconcerned about the special nature of capital cases,²⁸³ capital trial units would have the specialized knowledge necessary to represent defendants, devise standards, and monitor capital representation in the state.²⁸⁴ Performing these narrow duties would be the sole function of the unit. The responsibility for providing adequate defense to indigent capital defendants should be focused in one place and not distributed among the judiciary, the bar, and the state. While establishing such a system does not guarantee the complete eradication of ineffective representation, it should markedly improve representation of indigent death-eligible defendants at the trial level.

ENCOURAGING STATES TO ADOPT THIS SYSTEM

Although a number of states have adopted standards for the appointment of counsel in capital cases or have established capital trial units, many states have made no attempt to reform their systems. Whether these states will undertake any meaningful reform unless they are required to do so is doubtful.²⁸⁵

282. See *supra* notes 260-70 and accompanying text.

283. See *supra* notes 98-115 and accompanying text.

284. See *supra* notes 150-63 and accompanying text.

285. See TASK FORCE REPORT, *supra* note 8, at 221 (Minority Report of Stephen B. Bright).

Three main avenues of attack remain for reformers who wish to encourage states to adopt the type of capital trial unit system mentioned above. First, reformers can encourage Congress to pass legislation requiring states to adopt such a system to enforce the Sixth Amendment guarantee of the effective assistance of counsel. Second, reformers can encourage Congress to pass federal legislation providing funds to states on the condition that they set up the desired indigent defense system, or they can encourage Congress to pass legislation making the applicability of certain beneficial provisions conditional on the states' adoption of the desired indigent defense system. Finally, if Congress is reluctant to use its legislative power to enact these systems, reformers can bring legal challenges against systems that do not provide adequately for the appointment of competent counsel in capital cases.

Federalism Concerns and Congressional Action

Under the Tenth Amendment, the constitutional powers not expressly provided to the federal government are reserved for the states.²⁸⁶ The Supreme Court has struggled to define the extent to which Congress can subject state governments to federal laws. Most of the Supreme Court's decisions have involved congressional attempts to enact regulatory programs under the Commerce Clause.²⁸⁷ These decisions provide a general illustration of the federalism principles involved. In *Garcia v. San Antonio Metropolitan Transit Authority*,²⁸⁸ the Court held that the Tenth Amendment does not bar Congress from passing generally applicable laws that bind the states.²⁸⁹ In addition, "Congress may attach conditions on the receipt of federal funds."²⁹⁰ Congress also may establish a federal regulatory program and give states the option of regulating the activity in accordance with federal standards or having the federal government implement its program.²⁹¹

286. U.S. CONST. amend. X.

287. See *infra* notes 278-84 and accompanying text.

288. 469 U.S. 528 (1985).

289. *Id.* at 554-57.

290. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

291. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288

Recently, however, the Court has indicated that it may be returning to its pre-*Garcia* understanding of the relationship between the Tenth Amendment and the Commerce Clause. In *United States v. Lopez*,²⁹² the Court held that Congress exceeded its authority under the Commerce Clause when it passed the Gun-Free School Zones Act.²⁹³ The Court analyzed several factors in reaching its decision, one of which was the extent to which Congress was intruding on an area traditionally controlled by the states.²⁹⁴ The Court thus appeared to revive the analysis that it used in *National League of Cities v. Usery*.²⁹⁵ It is unclear after *Lopez* how much weight the Court will give to this factor. Nevertheless, the decision demonstrates a willingness to restrict Congress's broad Commerce Clause power.

One restriction on Congress's broad power under *Garcia* already exists. Despite Congress's broad power to regulate under the Commerce Clause, it cannot "commandeer[] the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program."²⁹⁶ In *New York v. United States*, the Supreme Court struck down part of a federal law requiring states to dispose of radioactive waste in accordance with federal standards or take title to such waste because the "take title" provision left a state government with no other alternative than that of implementing the federal legislation.²⁹⁷ The Court noted that, "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."²⁹⁸

(1981).

292. 115 S. Ct. 1624 (1995).

293. *Id.* at 1630-34.

294. The Court appeared to be very concerned that a broad reading of the Commerce Clause might allow Congress to regulate areas "where States historically have been sovereign." *Id.* at 1632.

295. 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

296. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981).

297. *New York v. United States*, 505 U.S. 144, 176-77 (1992).

298. *Id.* at 162.

These decisions demonstrate that Congress cannot force the states to adopt legislation, even when it has the power to regulate the matters involved directly, under the Commerce Clause. Any congressional attempt to force the states to adopt a specific indigent defense system, however, should be founded on Section Five of the Fourteenth Amendment. Under Section Five, the common federalism concerns raised above are not applicable.²⁹⁹

Section Five of the Fourteenth Amendment and Congressional Implementation of More Effective Systems for the Defense of Indigent Death-Eligible Defendants

Section Five of the Fourteenth Amendment gives Congress the power to enforce the provisions of the Fourteenth Amendment.³⁰⁰ The Due Process Clause of the Fourteenth Amendment has been held to incorporate the Sixth Amendment right to counsel, thus making it applicable to the states.³⁰¹ Theoretically, Congress could pass legislation under Section Five of the Fourteenth Amendment calling for states to adopt more effective capital representation systems because the Sixth Amendment right to effective assistance of counsel applies to the states through the Due Process Clause, and such legislation would enforce the Fourteenth Amendment's guarantee of due process.³⁰²

Although Section Five traditionally has been used to enforce the Equal Protection Clause, it also may be used to enforce incorporated rights.³⁰³ In *Hutto v. Finney*,³⁰⁴ the Court upheld an award of attorney's fees to state prisoners that the court of appeals ordered under the Civil Rights Attorney's Fees Awards

299. See *infra* notes 285-321 and accompanying text.

300. Section Five states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

301. *Gideon v. Wainwright*, 372 U.S. 335, 340-45 (1963).

302. See Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993) (discussing the use of Section Five to enforce the First Amendment through the Fourteenth Amendment's Due Process Clause).

303. See *id.* at 1053-60.

304. 437 U.S. 678 (1978).

Act of 1976.³⁰⁵ The court of appeals ordered the award after the district court had declared the prison conditions unconstitutional and had ordered the state to correct them.³⁰⁶ When the state failed to do so, the court ordered the award of attorney's fees as a further punitive measure.³⁰⁷

The state argued that the award was improper because it violated the federalism principles embodied in the Eleventh Amendment.³⁰⁸ The Supreme Court ruled, however, that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."³⁰⁹ The Court upheld the award of damages.³¹⁰

In *Hutto*, the Court thus used Section Five to allow a district court to make an award of damages against a state to enforce the Eighth Amendment, an incorporated right, pursuant to federal legislation. Justice Rehnquist apparently understood the Court's decision in this way because he noted in his dissent that,

[w]hile the Court has held that the Fourteenth Amendment "incorporates" the prohibition against cruel and unusual punishment, it is not at all clear to me that it follows that Congress has the same enforcement power under § 5 with respect to a constitutional provision which has merely been judicially "incorporated" into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters.³¹¹

Despite Justice Rehnquist's views, the Court appears to have sanctioned the use of Section Five to enforce incorporated rights. Not only can Congress enforce incorporated rights with Section Five, it also has the power to determine independently when such enforcement is necessary.³¹² In the seminal case on Sec-

305. *Id.* at 689.

306. *Id.* at 684-85.

307. *Id.*

308. *Id.* at 689.

309. *Id.* at 702 (quoting *Fitzpatrick v. Blitzer*, 427 U.S. 445, 456 (1976)).

310. *Id.* at 700.

311. *Id.* at 717-18 (Rehnquist, J., dissenting).

312. *Katzenbach v. Morgan*, 384 U.S. 641, 651-58 (1966).

tion Five, *Katzenbach v. Morgan*,³¹³ the Supreme Court held that Congress had the authority under Section Five to pass section 4(e) of the Voting Rights Act, which invalidated a New York literacy test as violative of the Equal Protection Clause.³¹⁴ The Court held that "§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."³¹⁵ The Court thus asserted that Congress can make its own assessment of the reach of constitutional rights even if it is different than the Court's assessment.³¹⁶

To avoid the implication that Congress could restrict the guarantees of the Fourteenth Amendment, the majority noted, in a footnote, that the power to "enforce" the Fourteenth Amendment does not mean that Congress may "restrict, abrogate, or dilute" guaranteed rights.³¹⁷ This footnote has given rise to the "ratchet theory" of constitutional rights enforcement.³¹⁸ Under this theory, Congress may pass legislation expanding the protections of the rights embodied in the Fourteenth Amendment, but it may not restrict them.³¹⁹ Commentators have debated at length whether the ratchet theory is a defensible constitutional principle.³²⁰

313. 384 U.S. 641.

314. *Id.* at 646-47.

315. *Id.* at 651.

316. *See id.*

317. *Id.* at 651 n.10.

318. Pawa, *supra* note 302, at 1062.

319. *Id.* It is unclear if there are limits on how far Congress may expand such protections. Recently, in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), the Court overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), and held that all racial classifications, including race-based presumptions passed by Congress pursuant to its Section Five power, needed to be analyzed using strict, and not intermediate, scrutiny, *Adarand*, 115 S. Ct. at 2112-13. Although the majority acknowledged that its members had different opinions on the power of Congress to use Section Five to expand the Fourteenth Amendment, *id.* at 2114, the dissent noted that the majority opinion implied that Section Five could not be used to expand the protections of the Fourteenth Amendment unless there was an independent violation of Section One, *id.* at 2126 n.11 (Stevens, J., dissenting). If this is the case, it appears to limit Congress's power to "ratchet" up the protections of the Fourteenth Amendment.

320. Pawa, *supra* note 302, at 1062-64.

Under *Morgan*, Congress not only has the power to use Section Five to identify independently the reach of constitutional rights, it also has the power to override principles of federalism embodied in the Tenth and Eleventh Amendments. In *City of Rome v. United States*,³²¹ the Court upheld a section of the Voting Rights Act of 1965 that required congressional pre-approval of state electoral changes that had discriminatory effects even if they had no discriminatory purpose.³²² An actual violation of constitutional rights thus does not have to occur before Congress uses Section Five to enforce rights.³²³ A risk of a violation is enough.³²⁴ Furthermore, the Court commented on federalism concerns, noting that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the [Fourteenth Amendment] 'by appropriate legislation.'"³²⁵

For such legislation to be an "appropriate" use of Section Five power, it must pass the three-prong test set forth by the Court in *Morgan*.³²⁶ First, the statute at issue must "be regarded as an enactment to enforce" the Fourteenth Amendment.³²⁷ Second, the statute must be "plainly adapted" to the end of enforcing the Fourteenth Amendment.³²⁸ Finally, the statute must be "consistent with 'the letter and spirit of the Constitution.'"³²⁹

Under the first prong of the *Morgan* test, as long as the Court continues to adhere to its position in *Hutto*, legislation mandating the imposition of a specific indigent capital defense system probably would be regarded as an enactment to enforce the Due Process Clause of the Fourteenth Amendment. Specifically, it would be an enactment to enforce the Sixth Amendment right to counsel incorporated by the Fourteenth Amendment Due Process Clause.

321. 446 U.S. 156 (1980).

322. *Id.* at 163, 177.

323. *Id.* at 173-78.

324. *See id.* at 177.

325. *Id.* at 179.

326. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

327. *Id.*

328. *Id.*

329. *Id.*

Under the second prong, the statute must be "plainly adapted" to enforcing the Sixth Amendment.³³⁰ The Court has stated that Congress must show some basis upon which it has identified a need for the statute.³³¹ The Court stated: "[i]t is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."³³² To satisfy this test, reformers and congressional members could introduce evidence of the many instances of inadequate representation in capital cases that resulted from counsel's inexperience or incompetence. This evidence should be enough to demonstrate to the Court that Congress had a rational basis for enacting the enforcement legislation.

Finally, Congress must show that the legislation is "consistent with 'the letter and spirit of the constitution'" and not prohibited by it.³³³ Providing indigent capital defendants with the effective assistance of counsel is required by the Sixth Amendment and thus is within the letter and spirit of the Constitution. Furthermore, the legislation is not prohibited by the Constitution because, under *City of Rome*, the Tenth and Eleventh Amendments do not restrict the reach of Section Five legislation.³³⁴ Therefore, the legislation should pass muster under the third prong.

Although Congress may well have the power under Section Five to enact legislation imposing specific indigent capital defense systems on the states, whether Congress will ever propose such legislation is unclear. In the current political climate, such legislation indeed seems very unlikely.³³⁵ Reformers should, however, consider pursuing this option when the political climate improves.³³⁶

330. *Id.*

331. *Id.* at 653.

332. *Id.*

333. *Id.* at 651.

334. *City of Rome v. United States*, 466 U.S. 156, 179 (1980).

335. See *supra* notes 41-79 and accompanying text (discussing Congress's attempts to restrict habeas corpus).

336. If Congress insists on eliminating federally funded Death Penalty Resource Centers, reformers might be able to encourage Congress to pass legislation establishing capital trial units while shifting the financial burden to the states and maintain-

The Federal Spending Power

If reformers are unable to convince Congress to pass legislation requiring the states to implement more effective indigent defense systems, they should attempt to encourage Congress to use the federal spending power to reform state indigent defense systems. Unless the Section Five argument is effective, Congress cannot directly force the states to adopt an indigent defense system due to federalism concerns.³³⁷ Congress can, however, urge them to do so by attaching conditions to the receipt of federal funds or by making certain legislative provisions applicable to states only if the states adopt the desired defense system.³³⁸

Congress could pass legislation providing that states that adopted the capital trial unit system would receive additional funds for federal prisons or for law enforcement.³³⁹ Congress has already demonstrated its willingness to condition the applicability of habeas corpus reform provisions on the state's adoption of mechanisms for providing counsel to indigent capital defendants.³⁴⁰ Unfortunately, the House of Representatives did not make the applicability of the habeas reforms conditional on the establishment of a trial system but rather on the establishment of a system for the appointment of postconviction counsel.³⁴¹

Although congressional urging may be an effective method of obtaining reform, several commentators have criticized this "carrot-and-stick" approach.³⁴² Opponents of the death penalty

ing a state source of expertise in capital defense.

337. See *New York v. United States*, 505 U.S. 144, 166, 188 (1992) (holding that, although Congress cannot compel states to adopt a federal regulatory program, it can "urge" them to do so); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (holding that Congress cannot take over the legislative processes of the states "by directly compelling them to enact and enforce a federal regulatory program").

338. See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress can attach conditions on the receipt of federal funds as long as the conditions are not unconstitutional and there is a nexus between the conditions and the funds).

339. Note, *supra* note 29, at 1938 n.146.

340. See *supra* notes 53-58 and accompanying text.

341. See *supra* notes 53-54 and accompanying text.

342. See TASK FORCE REPORT, *supra* note 8, at 195-98 (Minority Report of Malcolm M. Lucas); Berger, *supra* note 2, at 1686.

argue that the carrot-and-stick approach allows states to "buy" special habeas provisions, such as time limits on habeas review, in exchange for giving indigent defendants rights that they should have received anyway.³⁴³ By conditioning the applicability of habeas reforms on the adoption of a state indigent defense system, the system may devolve into a "two-tier" system with two types of habeas provisions applying to complying and non-complying states.³⁴⁴ This result would further complicate habeas corpus proceedings.³⁴⁵

This approach also has been criticized as too intrusive on the states because it requires them to "expend their limited revenues on federal projects which are not constitutionally mandated."³⁴⁶ Furthermore, some opponents have argued that the federal courts will be distracted from reviewing cases on the merits during the habeas process because they will be busy determining whether the states have complied with the opt-in provisions.³⁴⁷

The arguments against the use of habeas corpus procedures as the "carrot" to encourage states to adopt new indigent defense systems are well founded. In contrast, conditioning the receipt of funds on the implementation of a capital trial unit system does not seem to pose the same two-tier system problem that using habeas reforms as the "carrot" creates. Despite the theoretical possibility of using such a "carrot-and-stick" approach, in the recent political atmosphere, it seems very unlikely that Congress will increase funding for prison or law enforcement contingent on the reform of indigent defense systems.³⁴⁸ In the current political climate, reformers should focus on attacking inadequate defense systems in the judicial branch.

343. Berger, *supra* note 2, at 1686.

344. *Id.*

345. *Id.*

346. See TASK FORCE REPORT, *supra* note 8, at 196 (Minority Report of Malcolm M. Lucas).

347. See *id.*

348. Indeed, although the House used such an approach in the Effective Death Penalty Act, it refused to adopt a specific trial-level plan. The House rejected such a plan. See *supra* note 53 and accompanying text.

Legal Challenges to Inadequate Indigent Defense Systems

Legal challenges to indigent defense systems have met with limited success.³⁴⁹ Litigation against indigent defense systems primarily has been based on the theory that inadequate compensation and overwhelming caseloads violate a defendant's right to the effective assistance of counsel.³⁵⁰ Although a number of these cases have been rejected, courts have shown a willingness to consider systemic challenges and to fashion some sort of remedy.³⁵¹

In a series of cases in Arkansas, state prisoners sued the state prison system, alleging that harsh and oppressive prison conditions violated the Eighth Amendment prohibition against cruel and unusual punishment.³⁵² The district court ruled that conditions were unconstitutional and established recommendations for the State to follow in improving the conditions.³⁵³ The State did not act immediately to correct the conditions, and the court held numerous hearings on the prison conditions and continued to supervise the State's reform efforts from 1969 until 1977.³⁵⁴ The purpose of the reform was clear—the court was attempting to ensure that the constitutional violations were eliminated.³⁵⁵

349. Bright et al., *supra* note 120, at 10; Klein, *supra* note 118, at 363.

350. Bright, *supra* note 120, at 12, 47; Klein, *supra* note 118, at 426; *see, e.g.*, Wallace v. Kern, 392 F. Supp. 834, 848-49 (E.D.N.Y.) (ordering a new system for the assignment of counsel to indigents after challenge by an attorney), *vacated*, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984) (en banc) (holding that the indigent defense system was inadequate due to overwhelming caseloads); Madden v. Township of Delran, 601 A.2d 211, 212 (N.J. 1992) (involving an attorney's challenge to an indigent defense system structure that required him to represent indigent defendants for no pay).

351. *See* Wallace, 392 F. Supp. at 848-49; Madden, 601 A.2d at 218 (ordering a new system for the assignment of counsel to indigents after challenge by an attorney).

352. Holt v. Sarver, 309 F. Supp. 362, 364 (E.D. Ark. 1970) (*Holt II*), *aff'd*, 442 F.2d 194 (8th Cir. 1971), *rev'd sub nom.* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974), *aff'd sub nom.* Hutto v. Finney, 434 U.S. 901 (1977); Holt v. Sarver, 300 F. Supp. 825, 826 (E.D. Ark. 1969) (*Holt I*).

353. *Holt II*, 309 F. Supp. at 382-85.

354. Finney v. Hutto, 410 F. Supp. 251, 253 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978); Holt v. Hutto, 363 F. Supp. 194, 197 (E.D. Ark. 1973) (*Holt III*); *Holt II*, 309 F. Supp. at 382-85.

355. The court stated:

Let there be no mistake in the matter; the obligation of [the State] to

Although it may be more difficult to show that capital defendants are not receiving their constitutional right to counsel than it is to show that prisoners are being treated in a cruel and unusual manner, these cases raise the hope that a court might supervise the imposition of a more effective indigent defense system for capital defendants.

Another systemic challenge arose in *State v. Smith*.³⁵⁶ In *Smith*, a defendant appealed a conviction in part on the grounds that he was denied the effective assistance of counsel because his attorney had an unworkable caseload.³⁵⁷ The Arizona court found that the indigent defense system violated the defendant's state and constitutional rights to due process.³⁵⁸ Instead of fashioning a sweeping systemic remedy, however, the court ruled that, until the system was reformed by the legislature, there would be a rebuttable presumption of ineffective assistance of counsel in all cases tried under the system.³⁵⁹ In response to the ruling, the county started spending more money on indigent defense, and overall representation improved.³⁶⁰

Although *Smith* and the *Holt* cases demonstrate that there is hope in challenging systemic problems, to implement any permanent change, a court must be willing to fashion a systemic remedy. Unfortunately, courts have been reluctant to get involved in the restructuring of indigent defense systems even though they are more qualified to restructure these systems than other systems that they have changed in the past.³⁶¹

eliminate existing unconstitutionality does not depend upon what the Legislature may do, or, indeed, upon what [the State] may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

Holt II, 309 F. Supp. at 385.

356. 681 P.2d 1374 (Ariz. 1984) (en banc).

357. *Id.* at 1378-79.

358. *Id.* at 1381.

359. *Id.* at 1384.

360. Caroline A. Pilch, Note, *State v. Smith, Placing a Limit on Lawyer's Caseloads*, 27 ARIZ. L. REV. 759, 767 (1985).

361. The Supreme Court actively has encouraged the intervention of the courts in the past when "the administration of a government function was found to operate in a violation of the constitutional rights of some citizens." See Klein, *supra* note 118, at 424. Most judicial intervention has occurred in school desegregation cases. See,

In 1988, the Eleventh Circuit seemed ready to participate in the restructuring of the Georgia indigent defense system, when, in *Luckey v. Harris*,³⁶² it reversed a district court ruling that plaintiffs had failed to state a claim for which relief could be granted.³⁶³ The plaintiffs had sought a structural injunction to compel the indigent defense system to comply with the Sixth Amendment.³⁶⁴ Unfortunately, the case was later dismissed on abstention grounds.³⁶⁵

Although *Luckey* was dismissed, the use of a structural injunction to force a system to reform still seems to be a potentially viable weapon.³⁶⁶ The structural injunction is a remedial tool that allows a court to supervise the reconstruction of a state institution to ensure that it complies with the Constitution.³⁶⁷ It has been used in the past to reform schools, prisons, and mental hospitals,³⁶⁸ and it seems that a court would be even better suited to supervise the reconstruction of the defense system.³⁶⁹

If such a challenge were successful, a court could declare the indigent defense system unconstitutional and issue a set of guidelines mandating the imposition of capital trial units and standards for the appointment of counsel in capital cases.³⁷⁰ This was the approach followed in the *Holt* cases and in *State v. Smith*. Although courts may be unreceptive to these challenges at this time, by filing these suits, reformers can make others aware of the problems in the indigent defense systems and can

e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Court intervention in state indigent defense systems, however, seems even more appropriate than intervention in school systems because indigent defense systems are legal institutions and courts have special expertise in this area, making them better qualified to oversee reform efforts effectively. See Rodger Citron, Note, *(Un)Luckey v. Miller: The Case for a Structural Injunction To Improve Indigent Defense Systems*, 101 YALE L.J. 481, 499 (1991).

362. 860 F.2d 1012 (11th Cir. 1988), *cert. denied*, 495 U.S. 957 (1990).

363. *Id.* at 1018.

364. *Id.* at 1013.

365. *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992) (per curiam).

366. Citron, *supra* note 361, at 499.

367. *Id.* at 497.

368. *Id.* at 499.

369. *Id.*

370. *Id.* at 501.

take an active and aggressive role in the advocacy of systemic change.³⁷¹

CONCLUSION

The Sixth Amendment proclaims that all criminal defendants shall have the right to counsel which, in turn, the Supreme Court has held to mean the right to *effective* assistance of counsel. To comply with this mandate, states have implemented systems to provide indigent criminal defendants with counsel. That these systems are underfunded and inadequate is widely recognized. Congress, however, is seeking to curtail habeas corpus review of death penalty cases based on the premise that such reviews waste time and money. The federal government and state and local governments are eager to be hard on crime but are reluctant to appropriate money to provide for indigent defense systems. Due to the expansion of the number of death-punishable offenses and the irreversible nature of the death penalty itself, indigent defense systems must find specialized means of providing indigent capital defendants with adequate representation. Although funding is the key—and is sorely lacking—states can make systemic changes that will result in better representation. By including standards relating to the qualification of private attorneys to represent indigent defendants and by assembling capital trial units within an existing public defender system, the states can provide better representation to capital defendants and begin satisfying the requirements of the Sixth Amendment.

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371. See Klein, *supra* note 118, at 432.